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U. S. Supreme Court
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UNITED STATES REPORTS

VOLUME 238

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1914

CHARLES HENRY BUTLER

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, Chief Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.
CHARLES EVANS HUGHES, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
JOSEPH RUCKER LAMAR, Associate Justice.
MAHLON PITNEY, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.

THOMAS WATT GREGORY, Attorney General.
JOHN WILLIAM DAVIS, Solicitor General.
JAMES D. MAHER, Clerk.
FRANK KEY GREEN, Marshal.

[1] For allotment of The Chief Justice and Associate Justices among the several circuits see next page.

135397

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, OCTOBER 19, 1914.[1]

ORDER: There having been an Associate Justice of this court appointed since the adjournment of the last term,

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, OLIVER WENDELL HOLMES, Associate Justice.

For the Second Circuit, CHARLES E. HUGHES, Associate Justice.

For the Third Circuit, MAHLON PITNEY, Associate Justice.

For the Fourth Circuit, EDWARD D. WHITE, Chief Justice.

For the Fifth Circuit, JOSEPH R. LAMAR, Associate Justice.

For the Sixth Circuit, WILLIAM R. DAY, Associate Justice.

For the Seventh Circuit, JAMES C. MCREYNOLDS, Associate Justice.

For the Eighth Circuit, WILLIS VAN DEVANTER, Associate Justice.

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

[1] For previous allotment see 234 U. S., p. iv.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1914.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 673. Argued March 1, 1915.—Decided June 1, 1915.

The general rule is that the Appellate Court will not interfere with the decision of the Chancellor refusing an interlocutory injunction unless abuse of discretion clearly appears; where, however, the order sought to be enjoined operates to reduce revenue the Chancellor's discretion should be influenced by the fact that the decree, though interlocutory, may be the equivalent of a final decree.

The fact that irreparable injury might result from orders of the Interstate Commerce Commission, unless interlocutory injunctions might be granted restraining their enforcement, undoubtedly influenced Congress to enact the provision in the Act of October 22, 1913, for a direct appeal to this court from an order granting or denying, after notice and hearing, an interlocutory injunction.

Where appellants are able to concede that there was evidence which, although conflicting, tended to support the findings of the Commission, the practice of omitting the testimony and simply insisting in this court that the findings are insufficient to support the orders is commendable, not only as a saving of expense of printing the record but also of eliminating such testimony, as is necessarily immaterial in an appellate court which cannot reverse findings if supported by any substantial evidence, even though the evidence be conflicting.

The new Equity Rules (75, 76, 77) call for a winnowing out of the use-

less; the presentation of only relevant evidence and exhibits; the elimination of reduplications of oral and written evidence and condensation into narrative form of what is material to the issue before the court.

Where an existing freight rate is attacked, the burden is on complainant to show that it is unreasonable in fact; this rule especially applies when the rate has been in force for a long period, during which the traffic has greatly increased in volume.

Market price of property and work is affected by so many and varving factors that it is impossible to lay down fixed rules for ascertaining actual value; a common measure, however, is by comparison with amounts charged for the same article by different persons. This applies to some extent to freight charges by carriers.

Mere distance is not necessarily a determining factor in fixing freight rates; competition by water and rail and in the markets largely enter into such determination.

While mere comparison of rates does not necessarily tend to establish reasonableness of either, the finding of one of many rates to be higher than all the others may give rise to the presumption that the single rate is high; and if some of the lower rates had been prescribed by the Interstate Commerce Commission, there is a *prima facie* standard for testing the reasonableness of the rate under investigation.

The Interstate Commerce Commission having in this case, after consideration of much and varied evidence as to the rates charged on coal to Nashville, fixed the amount of the rate in light of the findings made on such testimony, and the rate fixed is not claimed to be confiscatory, this court holds that the findings support the order fixing the rate.

An order in this case requiring a carrier to extend to connecting carriers, as to competitive business, the same switching facilities that it extends to some of the other connecting carriers, in regard to the same class of business, is not violative of the due process provision of the Fifth Amendment, nor does it violate the provision in § 15 of the Commerce Act that a carrier shall not be required to give the use of its tracks or terminals to another carrier engaged in like business. *Pennsylvania* v. *United States*, 236 U. S. 351.

216 Fed. Rep. 672, affirmed.

THE facts, which involve the validity of orders of the Interstate Commerce Commission establishing rates on coal and also requiring the carrier to furnish certain switching facilities to connecting carriers, are stated in the opinion.

Mr. William A. Colston, with whom *Mr. Henry L. Stone*, *Mr. Claude Waller*, *Mr. John B. Keeble* and *Mr. Wm. A. Northcutt* were on the brief, for appellants:

If the facts found do not as a matter of law support the orders made, or if the Commission was without jurisdiction to make the orders, or if the orders result in taking appellants' property without due process of law, the interlocutory injunction should have been granted.

The facts found with respect to the coal rates do not, as a matter of law, support the order fixing rates.

The Commission was without jurisdiction to make the order fixing rates.

The enforcement of the Commission's order fixing rates takes appellants' property without due process of law.

The facts found by the Commission do not, as a matter of law, support the order as to switching practices.

The Commission was without jurisdiction to make the order as to switching practices.

The enforcement of the order as to switching practices takes appellants' property without due process of law.

The appellants have made out their case for a temporary injunction.

In support of these contentions, see *Buffalo Gas Co.* v. *Buffalo*, 156 Fed. Rep. 370; *Chicago Live Stock Ex.* v. *C. G. W. Ry.*, 10 I. C. C. 428; *Cotting* v. *Kansas City Stockyards*, 183 U. S. 79; *E. T., V. & G. Ry.* v. *Int. Com. Comm.*, 181 U. S. 1; *Fla. East Coast Ry.* v. *United States*, 234 U. S. 167; *Grand Trunk Ry.* v. *Michigan R. R. Comm.*, 231 U. S. 472; *Int. Com. Comm.* v. *Ala. Mid. Ry.*, 168 U. S. 144; *Int. Com. Comm.* v. *C., B. & Q. Ry.*, 168 U. S. 320; *Int. Com. Comm.* v. *C. G. W. Ry.*, 209 U. S. 108, 119; *Int. Com. Comm.* v. *Clyde S. S. Co.*, 181 U. S. 29; *Int. Com. Comm.* v. *C., R. I. & P. R. R.*, 218 U. S. 88, 101; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Int. Com. Comm.* v. *Diffenbaugh*, 222 U. S. 42; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 90–92; *Int. Com. Comm.* v.

Louis. & Nash. R. R., 190 U. S. 273; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 73 Fed. Rep. 409; *Int. Com. Comm.* v. *Nor. Pac. Ry.*, 216 U. S. 538; *Int. Com. Comm.* v. *Stickney*, 215 U. S. 98; *Intermountain Rate Cases*, 234 U. S. 476; *Indianapolis Gas Co.* v. *Indianapolis*, 82 Fed. Rep. 245; *K. & I. Bridge* v. *Louis. & Nash. R. R.*, 37 Fed. Rep. 567; *L. R. & M. Ry.* v. *St. L., I. M. & S. Ry.*, 41 Fed. Rep. 559; *S. C.*, 59 Fed. Rep. 400; *Louis. & Nash. R. R.* v. *Siler*, 186 Fed. Rep. 176; *Louis. & Nash. R. R.* v. *Stockyards Co.*, 212 U. S. 139; *Louis. & Nash. R. R.* v. *Behlmer*, 175 U. S. 648; *Memphis Freight Bureau* v. *Louis. & Nash. R. R.*, 26 I. C. C. 402; *Merchants Ass'n of Baltimore* v. *Penna. R. R.*, 23 I. C. C. 474; *Morris Iron Co.* v. *Balt. & Oh. R. R.*, 26 I. C. C. 240; *New Memphis Gas Co.* v. *Memphis*, 72 Fed. Rep. 952; *Pac. Tel. Co.* v. *Los Angeles*, 192 Fed. Rep. 1009; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Raymond* v. *Chicago Un. Tract. Co.*, 207 U. S. 20; *Reagan* v. *Farmers L. & T. Co.*, 154 U. S. 362; *Slider* v. *Southern Ry.*, 24 I. C. C. 312, 313; *Southern Ry.* v. *St. Louis Hay Co.*, 214 U. S. 297; *Spring Valley Water Co.* v. *San Francisco*, 165 Fed. Rep. 667; *Tap Line Cases*, 234 U. S. 1; *Tex. & Pac. Ry.* v. *Int. Com. Comm.*, 162 U. S. 197; *United States* v. *La. & Pac. Ry.*, 234 U. S. 1; *United States* v. *St. Louis Terminal Assn.*, 224 U. S. 383; *Waverly Oil Works* v. *Penna. R. R.*, 28 I. C. C. 621; Burke's Works (11) Boston ed., 1869; 22 Cyc. 751, 755, 782, 783, 822; High on Injunctions, § 13, pp. 19, 20; 1 History of English Law, p. XXVII; 2 Wigmore on Evidence, § 1353, p. 1666.

The ultimate findings of fact or conclusions of the Interstate Commerce Commission as to reasonableness or discrimination are subject to judicial review.

It was not necessary nor even desirable upon the motion for an interlocutory injunction to bring up the voluminous record before the Interstate Commerce Commission.

The facts found with respect to the rate order do not, as a matter of law, support the order fixing rates, and the Commission was without jurisdiction to make that order.

The facts found with respect to the order as to switching practices do not, as a matter of law, support that order, and the Commission was without jurisdiction to make the order as to switching practices.

Extracts from the debates on the Hepburn Bill show that Congress has not changed the rule as to review of the Commission's finding of fact by the judicial power of the Government, and that the conclusions of the Interstate Commerce Commission are subject to judicial review.

Extracts from the debates on the Hepburn Bill show that the amendment of § 1 of the Act to Regulate Commerce, defining the term "transportation" was intended to prevent unjust discrimination which necessarily arises from the ownership and control of facilities of transportation by shippers and receivers of freight.

In support of these contentions, see cases *supra* and *Bowling Green* v. *Louis. & Nash. R. R.*, 24 I. C. C. 228; *C., M. & St. P. Ry.* v. *Minnesota*, 134 U. S. 456; *Nashville* v. *Louis. & Nash. R. R.*, 33 I. C. C. 76; *Cohens* v. *Virginia*, 6 Wheat. 399; *Ex parte Young*, 209 U. S. 123; *Florida East Coast Ry.* v. *United States*, 234 U. S. 167; *Florida Shippers* v. *Atl. Coast Line*, 14 I. C. C. 476; *S. C.*, 17 I. C. C. 552; *S. C.*, 22 I. C. C. 11; *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541; *In re Financial Relations &c. of Carriers*, 33 I. C. C. 168; *Lebanon Commercial Club* v. *Louis. & Nash. R. R. Co.*, 28 I. C. C. 301; *Mt. Pleasant Fertilizer Co.* v. *Louis. & Nash. R. R.*, No. 6186, before I. C. C., Unreported No. A-748; *Pennsylvania Co.* v. *United States*, 236 U. S. 351; *Slider* v. *Southern Ry. Co.*, 24 I. C. C. 312, 313; *United States* v. *Louis. & Nash. R. R.*,

235 U. S. 314; *United States* v. *Louis. & Nash. R. R.*, 236 U. S. 318.

Mr. Solicitor General Davis for the United States:

The granting or refusing of an interlocutory injunction is a matter in the sound discretion of the court, and is not to be reviewed unless this discretion has been abused. No such abuse here appears. *Buffington* v. *Harvey*, 95 U. S. 99, 100; *Thompson* v. *Nelson*, 71 Fed. Rep. 339; *Vogel* v. *Warsing*, 146 Fed. Rep. 949; *American Grain Separator Co.* v. *Twin City Separator Co.*, 202 Fed. Rep. 202; *Samson Cordage Works* v. *Puritan Cordage Mills*, 211 Fed. Rep. 603.

The order of the Commission declaring the coal rate unreasonable involves a question of fact, and is neither without substantial evidence to support it, nor contrary to the indisputable character of the evidence.

The reasonableness of a rate is a question of fact, and the finding of the Commission thereon is conclusive unless it be without substantial evidence to support it or contrary to the indisputable character of the evidence. *Ill. Cent. R. R.* v. *Int. Com. Comm.*, 206 U. S. 441, 455; *Int. Com. Comm.* v. *Chicago & Alton R. R.*, 215 U. S. 479; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Int. Com. Comm.* v. *C., R. I. & P. Ry.*, 218 U. S. 88, 110; *Int. Com. Comm.* v. *Del., Lack. & West. R. R.*, 220 U. S. 235; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88; *Los Angeles Switching Case*, 234 U. S. 294; *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314.

The order of the Commission as to discriminatory switching practices likewise involves a question of fact, as to which the finding of the Commission is neither without substantial evidence to support it nor contrary to the indisputable character of the evidence. Nor does it violate any constitutional or statutory right of appellants.

Undue discrimination is a question of fact within the peculiar province of the Commission. *Int. Com. Comm.* v. *Alabama Midland Ry.*, 168 U. S. 144, 170; *Penna. R. R.* v. *International Coal Co.*, 230 U. S. 184, 196; *Mitchell Coal Co.* v. *Penna. R. R.*, 230 U. S. 247; *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314.

Penna. Co. v. *United States*, 236 U. S. 351, as to switching practices, is decisive of this case.

Mr. Charles W. Needham, with whom *Mr. Joseph W. Folk* was on the brief, for Interstate Commerce Commission:

All the matters in controversy were cognizable by the Commission.

There was substantial evidence before the Commission to support the orders in question.

The evidence was sufficient as to reasonableness of rates involved. The orders were based upon probative evidence and were not arbitrary.

On the facts of record before it the Commission was empowered to require appellants to cease and desist from their unjust discrimination with respect to switching practices at Nashville.

The order with respect to switching practices does not deprive appellants of their property without due compensation, in violation of the Fifth Amendment to the Constitution of the United States.

There was no error in the refusal of the District Court to grant appellants' motion for an interlocutory injunction.

In support of these contentions, see *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Atchison, T. & S. F. Ry.* v. *United States*, 232 U. S. 199; *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Beebe* v. *Guinault*, 29 La. Ann. 795; *Bonand* v. *Denesi*, 42 Georgia, 639; *Castoriano* v. *Dupe*, 145 N. Y. 250; *Chicago, M. & St. P. Ry.* v. *Iowa*,

233 U. S. 334; *Newton* v. *Levis*, 79 Fed. Rep. 715; *Colonial City Trackage Co.* v. *Kingston City R. R.*, 153 N. Y. 540; *Grand Trunk Ry.* v. *Michigan Railway Commission*, 231 U. S. 457; *Higginson* v. *C., B. & Q. Ry.*, 102 Fed. Rep. 197; *Houston & Texas Ry.* v. *United States*, 234 U. S. 342; *Ill. Cent. Ry.* v. *Int. Com. Comm.*, 206 U. S. 441; *Int. Com. Comm.* v. *Alabama Midland Ry.*, 168 U. S. 144; *Int. Com. Comm.* v. *Baltimore & Ohio R. R.*, 225 U. S. 306; *Int. Com. Comm.* v. *C., R. I. & P. Ry.*, 218 U. S. 88; *Int. Com. Comm.* v. *D., L. & W. Ry.*, 220 U. S. 235; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88; *Int. Com. Comm.* v. *Nor. Pac. Ry.*, 216 U. S. 538; *Int. Com. Comm.* v. *Un. Pac. R. R.*, 222 U. S. 541; *Jones* v. *Thatcher*, 48 Georgia, 83; *Kelley* v. *Boettscher*, 89 Fed. Rep. 125; *Kerr* v. *New Orleans*, 126 Fed. Rep. 920; *Lighterage Cases*, 225 U. S. 306; *Louis. & Nash. R. R.* v. *Finn* [Jan., 1915]; *MacLaury* v. *Hart*, 121 N. Y. 636; *McHenry* v. *Jewett*, 90 N. Y. 58; *Memphis Freight Bureau* v. *Louis. & Nash. R. R.*, 26 I. C. C. 402; *Baltimore Merchants Assn.* v. *Penna. R. R.*, 23 I. C. C. 474; *Minnesota Rate Cases*, 230 U. S. 352; *Mo. Pac. Ry.* v. *Larabee Mills*, 211 U. S. 612; *N. Y., New Haven & H. R. R.* v. *Int. Com. Comm.*, 200 U. S. 361; *Procter & Gamble* v. *United States*, 225 U. S. 282; *Rock Island Ry.* v. *Rio Grande R. R.*, 143 U. S. 590; *Schneider* v. *Rochester*, 155 N. Y. 619; *Southern Pac. Co.* v. *Earl*, 82 Fed. Rep. 690; *So. Pac. Co.* v. *Int. Com. Comm.*, 219 U. S. 433; *Strasser* v. *Moonelis*, 108 N. Y. 611; *Tex. & Pac. Ry.* v. *Abilene Cotton Co.*, 204 U. S. 426; *Un. Pac. Ry.* v. *Chi. &c. Ry.*, 163 U. S. 563; *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314; *Wisconsin &c. R. R.* v. *Jacobson*, 179 U. S. 287; *Workingmen's Council* v. *United States*, 57 Fed. Rep. 85; *Young* v. *R. K. G. L. Co.*, 129 N. Y. 57.

Mr. A. G. Ewing, Jr., with whom *Mr. T. J. McMorrough* was on the brief, for the city of Nashville.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Traffic Bureau of Nashville instituted proceedings before the Commerce Commission against the Louisville & Nashville, Nashville, Chattanooga & St. Louis, Tennessee Central, Illinois Central R. R. Companies, and the Nashville Terminal Company, seeking (1) a reduction of the $1 rate on coal and (2) to require a discontinuance of what was alleged to be a discriminatory switching practice in the yard at Nashville. After an elaborate hearing, in which volumes of testimony were taken, the Commission found that the $1 coal rate was unreasonable, and established an 80 cent rate. It also passed an order requiring the Railroad Companies to discontinue the discrimination in furnishing switching facilities. Thereupon the two Railroad Companies, first named, appellants herein, filed a bill in the District Court for the Middle District of Tennessee against the United States, the Commerce Commission and others attacking the validity of these two orders. The application for a temporary injunction having been denied the case was appealed to this court.

1. On the argument here the Appellants insisted that under the decisions in *Florida East Coast Ry.* v. *United States*, 234 U. S. 167; *Int. Com. Comm.* v. *Un. Pac. R. R.*, 222 U. S. 541; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, this court will determine whether the facts found do, as a matter of law, support the order of the Commission. The Government, on the other hand, contended that the case should be disposed of in conformity with the principle that an Appellate Court will not interfere with the decision of a Chancellor, refusing to grant an interlocutory injunction, unless it clearly appears that there has been an abuse of discretion. There can, of course, be no doubt that such is the general rule. But where the order of the Commission operates to reduce revenue it is manifest that the Chancellor's discretion should be influenced by the

fact that, though the application is for an interlocutory injunction, the decision thereon may, in many respects, be the equivalent of a final decree. On such a hearing the court should, therefore, consider that fact with all others, and grant the injunction, grant it on terms, or refuse it as the equity of the case may warrant.

It was no doubt because of the limited time in which orders of the Commission would be operative and that there might be cases in which irreparable injury would result if an interlocutory injunction was not granted, that Congress, by the Act of October 22, 1913 (38 Stat. 220) provided that "*an appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction.* . . ." This clause and the reasons above mentioned were evidently taken into consideration by the three judges who heard this case. For, in passing upon the application, the court made a full statement of the facts, delivered a carefully prepared opinion discussing the various contentions of the complainants and then made a decision on the merits of the case as submitted.

2. The facts involved have been so fully stated by the Commission (28 I. C. C. 533) and by the court below (216 Fed. Rep. 672) that it is unnecessary here to repeat them. The Railroad Companies did not offer all of the evidence which was considered by the Commission; and on this appeal they do not include in the record all of the hundreds of pages of testimony which had been submitted to the Commission, but—conceding that the evidence was conflicting and tended to support the findings of the Commission—they insist that the facts found were insufficient in law to sustain the orders which were made. This most commendable practice not only saved the expense of printing many volumes of testimony, but saved the substantial points in the case from being submerged in a flood

of testimony—much of which was explanatory before the Commission and most of which was wholly immaterial in an Appellate Court which cannot reverse findings when supported by substantial—though conflicting—evidence. The practice is also in compliance with the spirit of the new Equity Rules (75, 76, 77) which call for just such a winnowing out of the useless; the presentation of only the relevant parts of exhibits, documents, tables, and reports; the elimination of all reduplications in written and oral testimony and a condensation into narrative form of what is material to the then issue before the court.

3. By virtue of this conformity to the rules, we are in a position to consider the sharp-cut issue as to whether, as matter of law, the Commission's findings of fact sustain its order, and shall discuss first the rate on coal which, being treated as typical, was principally argued by counsel.

Where an existing freight rate is attacked, the burden is on the complainant to establish that it is unreasonable in fact. This is especially so where, as here, the rate has been in force for a long period during which time the traffic greatly increased in volume. In order to carry this burden in the present case, the Traffic Bureau, while alleging that the rate was unreasonable in itself and by comparison with other like rates, does not seem to have attempted to prove the cost, or value of the carrier's service, but apparently relied largely on proof showing that the Nashville rate was higher than that charged for a similar haul to other points.

While some elements of value are fixed, the market price of property and work is affected by so many and such varying factors as to make it impossible to lay down a rule by which to determine what any article or service is worth. But one of the most common measures by which to value the property or service of A is to compare it with the amount charged for the same thing by B, C and D. But

this method, if made the sole basis for ascertaining values, may often lead to improper results. For B, C and D may charge too much, or they may have been forced to charge too little. The same is true of determining, by comparison, the reasonableness of freight charges. Until some standard is adopted they may prove nothing—even where the two hauls are over the same mileage. For the rate attacked may tend to show that the others are too low—while they in turn might be relied on to prove that the first is too high. Both may be unreasonably high, or too low because compelled by conditions over which the carrier had no control. Water competition, rail competition, and competition of markets, enter so largely into the establishment of rates that mere distance is not necessarily a determining factor—indeed the statute itself recognizes that there may be circumstances under which it is lawful to charge less for a long haul than for a short haul over the same road. But while all this be true it is, nevertheless, a fact that a comparison of rates between two points on the same road, or with the charges on other roads, may furnish evidence of probative value.

In the present case the Commission pointed out that many facts had to be considered in applying the evidence offered for the purpose of showing that the $1 rate to Nashville was high by comparison with the charge made to other points. It found that coal was shipped over the Louisville & Nashville R. R. from Kentucky mines to Nashville, Memphis and Louisville. It also found that there was no substantial dissimilarity in the conditions at those three points and instituted a special comparison between the rates to those three cities. The result may be indicated by the following tabulation:

From Mines—

To Nash.,	via L. & N.,	109	m.,	$1	p. ton,	or	9.2	mills	p. m.
Memphis,	" " " "	276	"	1.10	"		4.	"	" "
Louisville,	" " " "	142	"	.65	"		4.5	"	" "

The defendants insisted that its $1.10 rate to Memphis did not furnish a fair criterion because it had been made low and reduced in order to meet competition. The commission, however, found that the *river rate* to Memphis was $1.40 per ton so that the Appellant's "not unreasonable" (26 I. C. C. 402) rate of $1.10 was not compelled by water competition. It further found that the rail competition at Memphis was not compelling. On these facts, and after giving a history of the increase and decrease in that rate (26 I. C. C. 402), the Commission seems to have treated the $1.10 rate, for 276 miles to Memphis, as in the nature of a voluntary charge which would tend to indicate that the $1 rate for 109 miles to Nashville was too high. A similar view was taken of the situation at Louisville, where water competition existed and where the 60-cent rate from the mine to Louisville, 142 miles, was practically the same as that of the Illinois Central which charged the same rate for a haul of 125 miles to Louisville.

Of course, competition by rail as well as by water may compel such a reduction in rates as altogether to destroy their value for purposes of comparison. But, as we understand, the Commission held that while there should be no parity between these cities, the rate of .60 charged by the Illinois Central for a haul of 125 miles to Louisville was, in view of all the facts, some indication of what a road like the Louisville & Nashville should charge on a haul of 109 miles to Nashville.

Among many other details briefly discussed in the report, the Commission dealt with the question of the earnings on the coal business to Nashville. It found that the Louisville & Nashville's coal cars had an average capacity of 41 tons, so that on shipments from the mines to Nashville there was a car revenue of $41, or a per-car-mile earning of 37.78 cents. If the car was returned empty, there would be a per-car-mile earning

of 18.87 cents. With this as a basis there was a comparison of the Nashville coal earnings with those on all traffic over the other roads entering that city. It showed:

	cents
L. & N. $1 rate on *coal* to N'ville, per car-mile earnings	37.78
N., C. & St. L., " " " "	24.64
Illinois Central " " " "	24.00

Average of *all traffic*, loaded and unloaded:

	cents
L. & N., per car-mile earnings	10.54
N., C. & St. L., " "	10.08
Illinois Central " "	7.78
Tennessee Central " "	16.43

In addition to these comparisons of coal rates and average earnings on all traffic, loaded and empty, the Commission found that while the $1 rate to Nashville had been in force many years, the carrying capacity of the cars had increased from 16 to 41 tons and the tractive power of engines from 660 to 1,165 tons. This practically doubled the earning capacity of fully loaded trains; and if, as argued, there has been a much larger increase in cost of labor, material, taxes and operating expenses no proof of that fact was made to the commission, for it found that "there was little more than a suggestion in the record as to the increased cost of labor and material and no attempt . . . to show operating cost." At the hearing of the application for a Temporary Injunction an affidavit was offered to show that the increase in cost of operation had largely exceeded the increase in earning capacity. But such evidence, important in itself and on the issue of reasonableness, cannot be considered here for the reason that it shifts the issue, for the case was submitted to the District Court not to pass on the facts but on the theory

that though the conflicting evidence might sustain the finding, the *facts found* did not as matter of law sustain the order.

It further appeared in the Report and Finding of the Commission that the Nashville Bureau [1] had offered innumerable exhibits comparing on ton and car-mile bases the Nashville rate with that to points in the southeast and on the Ohio and Mississippi Rivers. *Among these were certain rates which the Commission had prescribed.* There was also a general comparison on the Nashville rate with the charge for coal and other commodities to Nashville and other destinations. This evidence showed that "*in all these instances the Nashville rate yields the greatest earnings.*"

Giving the widest possible effect to the fact that mere comparison between rates does not necessarily tend to establish the reasonableness of either, it is still true that, when one of many rates is found to be higher than all others, there may arise a presumption that the single rate is high. And when to that is added the fact that some of the comparative and lower rates had been prescribed by the Commission, there was at least a *prima facie* standard

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[1] "In support of these contentions complainants offered innumerable exhibits comparing on ton, car, and train mile bases the Nashville rate with the rates on coal obtaining north of the Ohio River; with rates to St. Louis, East St. Louis, Louisville, Cincinnati, Memphis, and other points on the Ohio and Mississippi rivers from mines in Kentucky, Tennessee, and Virginia; with rates on coal prescribed by this Commission in a number of cases; with rates on coal to Chattanooga and to certain destinations in the southeast; with rates on coal from other mines to Nashville; with rates on other commodities to Nashville and to other destinations; with the average per-ton and per-car-mile rate received by defendants and other carriers on all traffic. In all of these instances the Nashville rate yields the greatest earnings. In elaborate detail defendants sought to analyze and rebut these comparisons in an endeavor to show that none was of any value in determining the reasonableness of the rate in issue."

which, after allowing for dissimilarity in conditions, might be used along with all the other evidence in order to test the reasonableness of the Nashville rate. No one of those facts was conclusive, for the character of the country through which the two roads had been built might differ. One might run through a level, thickly populated territory,—the other might have steep grades, long tunnels and a roadway expensive to maintain. The capital invested, the traffic hauled, the cost of operation and the earnings might differ, but nevertheless what was shown to be a reasonable rate on one, might, after allowing for the dissimilarity in conditions, earnings and cost, be a factor in determining the reasonableness of the rate on the other. The report in this case shows that the rate-making body had before it much and varied evidence of this character. After considering it as a whole, the Commission found that the $1-rate on coal shipped from the Kentucky mines to Nashville was unreasonable. In the light of these findings we cannot say that the facts set out in the Report, do not support the order. And since there is no contention, at this time, that the reduced rate is confiscatory, we can but repeat what was said in *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88:

"The pleadings charged that the new rates were unjust in themselves and by comparison with others. This was denied by the carrier. The Commission considered evidence and made findings relating to rates which the carrier insists had been compelled by competition, and were not a proper standard by which to measure those here involved. The value of such evidence necessarily varies according to the circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies and history of rate-making in each section of the country."

5. In its complaint before the Commission the Traffic

Bureau also attacked the practice of the Appellants by which, under filed tariffs, each made a charge of $3 per car for switching *non-competitive business* between industries within the terminal limits and in conjunction with the Tennessee Central.

The Bureau insisted that this practice was discriminatory and designed to prevent the switching of coal between the Tennessee Central and private industries, located on sidings and reached through the Terminals. The defendants admitted the practice and the intention, but insisted that the Yards had never been thrown open to such business. They claimed that they had the right to the exclusive use of their own terminals and could not be required to switch cars loaded with "coal or competitive freight" to and from the Tennessee Central.

In considering this branch of the case the Commission found that the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, by reason of endorsements on bonds, and by an agreement to pay 4 per cent. on the capital stock of the Nashville Terminal Company, had leased the Yards for 999 years,—the rental being paid by the two lessees in proportion to the business done by each; That while the Louisville & Nashville owned 70 per cent. of the stock of the Nashville, Chattanooga & St. Louis, the two roads were not only separate corporate entities but were competitors at Nashville—particularly in the transportation of coal. It found that each switched for the other and both switched for the Tennessee Central, except as to "coal and competitive business." It found that such a switching practice was unreasonable and unjustly discriminatory, and that a 'reasonable practice would permit the switching of coal from the interchange of each carrier to industries on the rails of each other.' It thereupon issued an order requiring Appellants to cease the discrimination found to exist and to maintain "a practice which will permit the interswitching of such

shipments from and to the lines of each and every defendant" [including Tennessee Central].

The Appellants attack this order as being void because (1) it compels them to admit the Tennessee Central into an arrangement for operating joint terminals at Nashville under a contract guaranteeing interest on bonds and pro-rating operating expenses; (2) takes their property in the Yards without due process of law; (3) violates § 15 of the Commerce Act (34 Stat. 589) in compelling them, in effect, to make through routes and joint rates with the Tennessee Central when the appellants themselves have already established "a reasonable and satisfactory through route;" and (4) violates § 3 of the same Act which, after requiring carriers to afford equal facilities for the interchange of traffic, declares that the section "shall not be construed as requiring any such carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

These objections treat the order as being broader than its terms. The Commission did not, as in *Waverly Oil Works Co.* v. *Penna. R. R.*, 28 I. C. C. 626, 627, pass upon the question as to what was a proper switching charge as affected by the rental of the yard and the cost of operation. Neither did it direct the Appellants to establish a joint rate and a through route with the Tennessee Central. Neither did it order the Appellants to give the use of their terminals to the Tennessee Central, but only required them to render to the latter the same service that each of the Appellants furnishes the other in switching cars to industries located in and near the Yard.

Disregarding the complication arising out of joint ownership and the fact that each of the Appellants switches for the other, it will be seen that the Commission is not dealing with an original proposition, but with a condition brought about by the Appellants themselves.

Under the provisions of the Commerce Act (24 Stat. 380) the reciprocal arrangement between the two Appellants would not give them a right to discriminate against any person or "particular description of traffic." For, § 3 requires Railroad Companies to furnish equal facilities for the interchange of traffic between their respective lines . . . "provided that this should not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." If the carrier, however, does not rest behind that statutory shield but chooses voluntarily to throw the Terminals open to many branches of traffic, it to that extent makes the Yard public. Having made the Yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of § 3 of the statute which prohibits the facility from being used in such manner as to discriminate against patrons and commodities. The carriers cannot say that the Yard is a facility open for the switching of cotton and wheat and lumber but cannot be used as a facility for the switching of coal. Whatever may have been the rights of the carriers in the first instance; whatever may be the case if the Yard was put back under the protection of the proviso to § 3, the Appellants cannot open the Yard for most switching purposes and then debar a particular shipper from a privilege granted the great mass of the public. In substance that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others. This feature of the case was thus dealt with by the District Court:

"We think it clear that this order does not require the petitioners to give the use of their tracks and terminal facilities to the Tennessee Central Railroad, within the meaning of the proviso contained in Section 3 of the Act to Regulate Commerce, or constitute an appropriation of

such tracks and terminals for the use of the Tennessee Central Railroad.

* * * * * * * *

"There is furthermore no evidence that the switching practices prescribed will violate the constitutional provision against taking property without due process of law. See *Grand Trunk Ry.* v. *Michigan Commission*, 231 U. S. 468. And it may well be assumed that the petitioners will not themselves establish a switching charge so low as to be confiscatory."

The question, as to power of the Commission to make this part of the order, is settled by the decision in *Pennsylvania Company* v. *United States*, 236 U. S. 318, recently decided. The appellants, however, insist that that case did not involve *switching* but *transportation;* and further they claim that the Pennsylvania road was there ordered to *discontinue* discrimination—while here the appellants are required by an affirmative order to *devote* their property to the use of a parallel and competing carrier. But the alleged differences do not serve to take the present case out of the principle announced in that just cited. For in this order the prohibition against the existing practice and the requirement to furnish equal facilities come to the same thing.

In this case the controlling feature of the Commission's order is the prohibition against discrimination. It was based upon the fact that the appellants were at the present time furnishing switching service to each other on *all* business, and to the Tennessee Central on all except coal and competitive business. As long as the Yard remained open and was used as a facility for switching purposes the Commission had the power to pass an order—not only prohibiting discrimination—but requiring the appellants to furnish equal facilities "to all persons and corporations without undue preference to any particular class of persons." The question as to what is a proper practice, the

amount of charge therefor and the length of time such switching ervice is to continue are matters not presented for decision on this record. The judgment of the District Court is

Affirmed.

MR. JUSTICE PITNEY concurs in the result.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

KREITLEIN *v.* FERGER.

ERROR TO THE APPELLATE COURT OF THE STATE OF INDIANA.

No. 157. Submitted January 22, 1915.—Decided June 1, 1915.

Under § 21 of the Bankruptcy Act of 1898, a certified copy of the order of discharge is evidence of the jurisdiction of the court making it, the regularity of the proceedings and of the fact that the order was made.

While the introduction of the order in discharge may make out a *prima facie* defense that case may be disproved by introduction by the defendant of the bankruptcy record, if the latter shows that the debt scheduled was not the same as the one sued on, was not a provable debt, was not properly scheduled, or that notice was not properly given to the creditor.

A judgment may be a provable debt even if rendered in a suit where the creditor elected to bring an action in trover as for a fraudulent conversion instead of assumpsit for a balance due on open account.

It is not a fatal defect because the schedule shows the debt as a balance on open account for merchandise instead of a judgment into which the liability for the merchandise had been merged, or because there may have been a difference between the amount of the original debt as scheduled and the amount of the judgment. In such a case the burden is on the creditor to show that the judgment was not the identical claim scheduled.

The Bankruptcy Act failing to prescribe the form of designation to be

used in listing creditors in the schedule, the use of an initial instead of the use of a full Christian name is not a fatal mistake.

While failure to comply with the statutory requirements to file a list of creditors showing their residence, if known, will render the discharge inoperative against those not receiving actual notice in time to have their claims allowed, *quære*, where the burden under § 17 (3) lies as to proving sufficiency or insufficiency of notice.

Bearing in mind that the Bankruptcy Act does not expressly require the use of initials and addresses, and that its general purpose is to relieve honest bankrupts, *held* in this case, that as no rules have been made as to addresses in the district in which Indianapolis is located, a schedule listing a creditor's residence simply as Indianapolis is *prima facie* sufficient.

THE facts, which involve the effect of a discharge in bankruptcy, the obligation of the bankrupt to schedule the debts of the creditor, and sufficiency of notice to the creditor, are stated in the opinion.

Mr. John B. Elam, *Mr. James W. Fesler* and *Mr. Harvey J. Elam* for plaintiff in error:

The Appellate Court denied plaintiff in error rights under the Federal bankruptcy law, and should have ordered a new trial on the ground that the evidence introduced by the defendant made a perfect defense to the action and that the evidence was not sufficient to support the finding and that the finding was contrary to law, because,

The evidence of the discharge in bankruptcy proved a complete defense to the debt proved by the plaintiff without any further evidence because,.

Under the Indiana rules of practice, where the evidence is in the record and there is no contradiction in it, the Appellate Court will weigh it even in the interest of the appellant and in its discussion in this case the Appellate Court seems to accept this rule. *First National Bank* v. *Farmers Bank*, 171 Indiana, 323; *Riley* v. *Boyer*, 76 Indiana, 152.

A certified copy of an order granting a discharge should be evidence of the jurisdiction of the court, the regularity of the proceedings and of the fact that the order was made. Bankruptcy Act, § 21f; *Hays* v. *Ford*, 55 Indiana, 52; *Begein* v. *Brehm*, 123 Indiana, 160; *Hancock Bank &c.* v. *Farnum*, 176 U. S. 640, 645.

The debt established by the plaintiff in this case was a provable debt. Bankruptcy Act, § 63, a (1).

A discharge in bankruptcy releases the debtor from all provable debts when there is no evidence before the court that the debt belongs to any of the excepted classes. Bankruptcy Act, § 17.

If the plaintiff claimed his debt was within any of the exceptions to § 17, the burden was on him to prove it. *Goddin* v. *Neal*, 99 Indiana, 334; *Thompkins* v. *Williams*, 137 App. Div. 521, aff'd 206 N. Y. 744; *Anthony* v. *Sturdevant*, 56 So. Rep. 571; *Hallagan* v. *Dowell*, 139 N. W. Rep. 883; *Grocery Co.* v. *Teasley*, 53 So. Rep. 815; *Alling* v. *Stratka*, 118 Ill. App. 184; *Lafoon* v. *Kerner*, 138 N. Car. 281; *Van Norman* v. *Young*, 228 Illinois, 425, 430; *Bailey* v. *Gleason*, 76 Vermont, 115; *New York &c.* v. *Crockett*, 102 N. Y. Supp. 412; *In re Peterson*, 118 N. Y. Supp. 1077; *Gatliff* v. *Mackey*, 104 S. W. Rep. 379; 1 Stephen on Pleading, p. 120; Works' Indiana Pr. & Pl., § 365; *Sherwood* v. *Mitchell*, 4 Denio, 435; *Imhoff* v. *Whittle*, 81 S. W. Rep. 814.

Sorden v. *Gatewood*, 1 Indiana, 107; *Imhoff* v. *Whittle*, 82 S. W. Rep. 1056, are not persuasive authority.

The fact that the creditor did not have actual knowledge of the bankruptcy does not keep the discharge from being effective. *Wiley* v. *Pavey*, 61 Indiana, 457; Bankruptcy Act, §§ 17, 58; *Beck* v. *Crum*, 127 Georgia, 94.

The evidence introduced by the defendant in addition to the discharge in bankruptcy was sufficient in the absence of contradiction to prove that the plaintiff's debt was not within any of the class of debts excepted from the operation of the discharge, because:

The mere fact that the original judgment was given without exemption does not show that it is within any of the excepted classes. *Crawford* v. *Burke*, 195 U. S. 176.

Plaintiff's debt was properly scheduled, because the description of the debt given in the schedule, so far as it goes, is a description of the plaintiff's debt. *Matteson* v. *Dewar*, 146 Ill. App. 523.

The evidence, so far as introduced, showed that the debt was properly scheduled as to name. *Bridges* v. *Layman*, 31 Indiana, 384; *Matteson* v. *Dewar*, 146 Ill. App. 523; *Finnell* v. *Armoura*, 117 Pac. Rep. 49; *Gatliff* v. *Mackey*, 31 Ky. L. R. 947; *Longfield* v. *Minnesota &c.*, 103 N. W. Rep. 706.

Bascom v. *Turner*, 5 Ind. App. 229; *Schearer* v. *Peale*, 9 Ind. App. 282; 1 Burns' Rev. Stat. 1914, § 343, holding that an initial is not a name are cases founded on an Indiana statute dealing with the subject of pleading and not in point here and have no application in construing the Federal statute which cannot be affected by any Indiana statute.

So also as to *Louden* v. *Walpole*, 1 Indiana, 319.

The debt was duly scheduled with the residence of the creditor and it was not necessary to give any street address. *Miller* v. *Guasti*, 226 U. S. 170; *Guasti* v. *Miller*, 203 N. Y. 259; *Finnell* v. *Armoura*, 117 Pac. Rep. 49; *North Commercial Co.* v. *Hartke*, 110 Minnesota, 338; *Gatliff* v. *Mackey*, 31 Ky. L. R. 947.

No appearance for defendant in error.

Mr. Justice Lamar delivered the opinion of the court.

In 1897 Ferger brought suit against Kreitlein in an Indiana court. The pleadings in that case are not set out in the record and the nature of the suit does not appear except as it may be inferred from the special findings

of the jury, copied in this record, which show that 'when Kreitlein purchased the flour in November, 1895, he was insolvent. He made no false representations as to his financial condition . . . the plaintiff understood that the sale was for cash.' These answers, and the fact that the judgment was for "$300 damages" indicate that that suit was in the nature of an action of trover for the recovery of flour. This judgment rendered November 23, 1897, was not paid; and in 1907, ten years later, Ferger brought the present suit against Kreitlein on that judgment, alleging that it "was not for any debt growing out of or founded upon a contract express or implied." The defendant filed a plea that in 1905 he had received his discharge in bankruptcy.

At the trial the plaintiff introduced the judgment of 1897; testified that it had not been paid, and that 'until lately he did not know that Kreitlein had gone through bankruptcy, having had no notice of it.' The defendant then introduced a certified copy of his discharge, dated November 11, 1905. He also offered a copy of the record in the bankruptcy proceedings, including the "Schedule of Creditors," in which appeared an entry showing a debt in 1895 of $271.85, for merchandise, to C. Ferger, Indianapolis.

The plaintiff objected to the admission of this record "for the reason that the testimony shows that he [Ferger] has not had any notice of this bankruptcy proceeding . . . and for the further reason that this is an action on a judgment. The schedule shows that it is on an account. The records show that this was reduced to a judgment in 1897 and this schedule was not filed until 1905." The objection was overruled and the record admitted. No further evidence was offered and thereupon the court entered judgment for the plaintiff. That judgment having been affirmed by the Appellate Court of Indiana, the case was brought here by Kreitlein who in-

sists that by the Federal law he was relieved from liability on the pre-existing judgment.

1. Under the provisions of § 30 of the Bankruptcy Act this court has prescribed the form [59] of the "Order of Discharge" which, among other things, contains a recital that the bankrupt has been discharged from all provable debts existing at the date of the filing of the petition, "excepting such as are by law excepted from the operation of a discharge in bankruptcy." Section 21f further declares that a certified copy of such order "shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made." This provision of § 21f was made in contemplation of the fact that the Bankrupt might thereafter be sued on debts existing at the date of the filing of the petition in bankruptcy; and was intended to relieve him of the necessity of introducing a copy of the entire proceedings so that he might obtain the benefit of his discharge by the mere production of a certified copy of the order.

There are only a few cases dealing with the subject but they almost uniformly hold that where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order makes out a *prima facie* defense, the burden being then cast upon the plaintiff to show that, because of the nature of the claim, failure to give notice or other statutory reason, the debt sued on was by law excepted from the operation of the discharge. *Roden Co.* v. *Leslie*, 169 Alabama, 579; *Tompkins* v. *Williams*, 206 N. Y. 744, affirming the opinion in 137 App. Div. 521; *Van Norman* v. *Young*, 228 Illinois, 425; *Beck* v. *Crum*, 127 Georgia, 94; *Laffoon* v. *Kerner*, 138 N. Car. 281. Compare *Hancock* v. *Farnum*, 176 U. S. 645. There were some decisions to the contrary under the Act of 1841. Among them was *Sorden* v. *Gatewood*, 1 Indiana, 107, which held that when the bankrupt was sued on a valid claim he was obliged to show that the plaintiff's debt was

among those which had in law and in fact been discharged. It was probably because of this decision of the state court that the defendant Kreitlein felt compelled to offer the schedule in order to show that Ferger was one of the creditors listed in the bankruptcy proceedings. The issue now is whether the *prima facie* defense made out by the production of the certified copy of the Order was disproved by the introduction of the bankruptcy record. That question can best be answered by considering the various reasons the defendant in error advances in support of his contention that the discharge of 1905 did not operate to relieve Kreitlein from the debt now represented by the judgment of 1897.

2. On the part of Ferger it is said that this suit is on a judgment for $300 rendered in an action not "founded upon a contract express or implied"—and it seems to have been claimed that the judgment was not a provable debt within the meaning of § 63 (a. 4), of the Bankruptcy Act. But the special finding of the jury in that case showed that in purchasing the flour Kreitlein had not made any fraudulent concealment or misrepresentation as to his financial condition. Besides the judgment was a provable debt even though rendered in a suit where the creditor had elected to bring an action in trover, as for a fraudulent conversion, instead of *assumpsit* for a balance due on open account. *Crawford* v. *Burke*, 195 U. S. 176, 193.

3. Ferger next insists that there is a want of identity between the debt sued on and that said to have been discharged. This contention is based upon the fact that the schedule lists an 'account for merchandise for $271 in 1895 in favor of C. Ferger,' while the present suit is on a 'judgment for $300 damages rendered in favor of Charles Ferger in 1897.' The difference between the two amounts is probably explained by the fact that there had been an accrual of two years' interest before the judgment was rendered. Besides the books of the debtor and of the

creditor may not have exactly agreed and in the absence of fraud and injury such discrepancy would not invalidate the schedule or vitiate the effect of the discharge. Nor would the bankrupt be deprived of the benefit of the order because the debt was described as an 'account for merchandise' rather than as a judgment into which the liability for the flour had been merged. See *Matteson* v. *Dewar*, 146 Ill. App. 523, where it was held not to be a fatal defect for the Bankrupt to schedule the debt as an "account" even though a note had been given in settlement.

The *prima facie* effect of the order, to relieve the bankrupt from liability on all debts prior to 1905, was not defeated because there *may* have been a difference between the account and the judgment. The burden of showing that there was such difference was upon the creditor and in this case there was not only no evidence tending to sustain such a contention, but the two claims seem to have been treated as identical in the trial court, for there the objection to the admission of the Schedule was based on the contention that it referred to an account "which had been reduced to a judgment in 1897."

4. Another question—and the one on which the Appellate Court based its decision,—was whether the Schedule, listing the creditor as C. Ferger, Indianapolis—using an initial and omitting the street number of his residence—met the requirements of § 7 (8), making it "the duty of bankrupts to prepare, make oath to, and file . . . a list of his creditors showing their residences if known, if unknown that fact to be stated."

While this only involves a determination of what is a sufficient designation of a person's name and residence, yet it is one of those apparently simple questions which has been the occasion of an immense amount of controversy. The difficulty grows out of the impossibility of applying a general and uniform rule where there are so many varying

methods by which men's names and residences are designated. Some men have a well-known and constantly used Christian name; others are addressed by an abbreviation for the Christian name; others by initials for the Christian name; others are known by nickname. Some men use one name in business and another among their acquaintances. Some men, while personally addressed by their full Christian name, use initials in signing letters, notes, checks and other papers.

The Bankruptcy Act fails to prescribe which form of designation shall be used in listing creditors in the schedule. The statute must be construed in the light of the fact that it not only applies to transactions growing out of dealings between those personally acquainted, but, in large degree, relates to matters growing out of transactions between persons living in distant States and who may never have met. In many instances the only knowledge the debtor has as to the name of his creditor is derived from signatures, letterheads, drafts and like instruments—in which the name of the creditor may be designated by initials, or by abbreviation, or by a full Christian name. To say that the use of an initial in listing a creditor was improper when the creditor himself may have used an initial in signing letters addressed to the Bankrupt—or may himself have constantly received letters addressed to him in that manner—would not only ignore a common business practice, but would, in many instances, work a great hardship. This has been recognized in other branches of the law. For, while, of course, in all legal proceedings it is safest to designate persons by their Christian names,—and in some States this is even required by statute,—yet it has likewise been held that the use of the initial is an irregularity and not a fatal defect. *Queen* v. *Dale*, 17 Ad. & Ell. 64; *State* v. *Webster*, 30 Arkansas, 166; *Perkins* v. *McDowell*, 3 Wyoming, 203; *Minor* v. *State*, 63 Georgia, 320; *State* v. *Johnson*, 93 Missouri, 73.

There have, no doubt, been multitudes of instances in which initials have been used in listing creditors in Bankrupt schedules, but the only decision found which deals with this question is *Gatliff* v. *Mackey*, 104 S. W. Rep. 379 (Kentucky). It holds that the listing of the creditor by an initial, instead of the full Christian name, is not sufficient to deprive the debtor of the benefit of the order discharging provable debts. See also *Matteson* v. *Dewar*, 146 Ill. App. 523.

5. Of a like nature, and to be governed by the same principle, is the contention that, even if C. Ferger is a sufficient listing of the name, the schedule was fatally defective because it failed to give the street and number of his residence in Indianapolis. This objection is more difficult of solution than any of the others presented by this record. But, like them, it must be considered in the light of the fact that the statute was intended for business men and should receive not only a practical but a uniform construction. Its provisions are applicable to creditors who live in the country, in villages, in towns and cities. The statute is general in its terms and the courts cannot add to its requirements.

All of the cases dealing with the subject recognize the necessity of having claims properly listed, and point out that failure to comply with the statutory requirement to file a list of his creditors, showing their residence if known, will render the discharge inoperative against any who did not receive actual notice of the bankruptcy proceeding in time to have their claims allowed. *Columbia Bank* v. *Birkett*, 195 U. S. 345; *Troy* v. *Rudnick*, 198 Massachusetts, 567. The authorities, however, differ as to whether under § 17 (3) the burden is on the plaintiff to show that he had no notice, or on the bankrupt to show that the creditor had notice in time to have proved his claim and had it allowed. *Steele* v. *Thalheimer*, 74 Arkansas, 518; *Van Norman* v. *Young*, 228 Illinois, 430; *Alling* v. *Straka*,

118 Ill. App. 184 (2); *Hallagan* v. *Dowell*, 139 N. W. Rep. 883 (Iowa); *Parker* v. *Murphy*, 215 Massachusetts, 72; *Wineman* v. *Fisher*, 135 Michigan, 608; *Laffoon* v. *Kerner*, 138 N. Car. 285; *Fields* v. *Rust*, 36 Tex. Civ. App. 351; *Bailey* v. *Gleason*, 76 Vermont, 117, 118; *Custard* v. *Wigderson*, 130 Wisconsin, 414. In view of the scope of his testimony that he did not know of the Bankruptcy it is not necessary in this case to discuss that mooted point, unless it must be held that, because of the failure to set out the number of Ferger's house in Indianapolis, his claim was not duly scheduled.

The question as to the necessity of giving the street address has sometimes arisen in suits against endorsers, who claimed that they were relieved from liability because the notice of non-payment and protest was addressed to them at the city where they lived, but without adding the street and number of his residence. It seems generally to have been held that mailing a notice thus addressed is *prima facie* sufficient. *True* v. *Collins*, 3 Allen, 438; *Clark* v. *Sharp*, 3 M. & W. 166; *Mann* v. *Moors*, Ryan & M. 250; *Peoples Bank* v. *Scalzo*, 127 Missouri, 188; *Morton* v. *Westcott*, 8 Cush. 425; *Bartlett* v. *Robinson*, 39 N. Y. 187. See also *Bank of Columbia* v. *Lawrence*, 1 Pet. 578, 581; *Bank of United States* v. *Carneal*, 2 Pet. 550, 551. There are only a few instances, under the Bankrupt Act, in which the courts have had occasion to deal with the subject, or to construe § 7 (8),—requiring claims to be duly listed—, in connection with § 17, which provides that a discharge shall release the debtor from all provable debts "except such as . . . (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy. . . ." It has been held that a claim is not duly scheduled if the name of the creditor is improperly spelled (*Custard* v. *Wigderson*, 130

Wisconsin, 414); or if the street number is given but the name of the city of his residence is omitted (*Troy* v. *Rudnick*, 198 Massachusetts, 563); or if the creditor is listed as residing in one city when he actually lives in another (*Marshall* v. *English Co.*, 127 Georgia, 376): or if the creditor's name is given but the schedule falsely recites "Residence unknown" (*Birkett* v. *Columbia Bank*, 195 U. S. 345; *Miller* v. *Guasti*, 226 U. S. 170; *Parker* v. *Murphy*, 215 Massachusetts, 72). These decisions, however, were based on extrinsic proof and on a finding that, as a matter of fact, the name was misspelled, or the creditor's residence was improperly listed, or that the bankrupt knew the creditor's address and falsely stated that the residence was "Unknown." None of them holds that, as a matter of law, the discharge was rendered inoperative merely because the street number was not given in the schedule.

6. Indeed, it is not claimed that the Act requires that this street address should be stated in every instance where the creditor lives in a city having a Postal Delivery System. *Evans* v. *Fleuring*, 62 Kansas, 813. But, it is argued, that this should be done where he resides in one of the very large cities of the country. And we find that in some Districts the Referee examines the schedule and, in his discretion, requires it to be amended so as to give the street number (*In re Brumelkamp*, 95 Fed. Rep. 814; *In re Dvorak*, 107 Fed. Rep. 76). We also find that the Bankruptcy Rules of force in the Southern District of New York provide (italics ours) that the schedules "as respects creditors *in the city of New York*, should state the street and number of their residence, or place of business so far as known." *Widenfeld* v. *Tillinghast*, 54 Misc. N. Y. 93. See also *Cagliostro* v. *Indelle*, 17 A. B. R. 685; *McKee* v. *Preble*, 138 N. Y. Supp. 915.

But without considering the effect of such Rule, it is sufficient to say that, in the present case, there was nothing to show that any similar regulation had been made in the

Indiana District, nor is there proof as to what was Ferger's street address; or that Kreitlein knew such address at the time he made the schedule; or that the notice may not have been delivered during Ferger's absence from the city and not received by him on his return. Nor is there any evidence to show that Ferger did not constantly and promptly receive letters addressed to him at Indianapolis without the street number being given.

7. It is said that Kreitlein might have examined the Directory, but the suggestion presupposes that at the time of making the schedule the bankrupt had access to a directory and overlooks the fact that even if the address given therein was correct when made, the creditor may have moved before the book was issued so that if notice was mailed to an incorrect street address the creditor might contend that such specific address was not required by statute and that the burden of the mistake was cast on the bankrupt. We are here dealing with a general rule applicable to cases where the parties reside in different parts of the country as well as to instances where they lived in the same city. The rule is the same as to both. There certainly is no presumption that bankrupts have access to directories containing the street addresses of their creditors throughout the land; and, if the fact was essential, the question as to whether the bankrupt had access to a directory, or whether it was correct, were matters of proof, none of which was made in the present case.

8. Both as to the use of initials and omission of street address the Act must be given a general construction and in the light of the fact that letters directed to persons by their initials are constantly, properly and promptly delivered in the greatest cities of the country even when the street number is not given. When it is considered that the schedule must not only include claims of recent origin but debts which have accrued many years before and where the creditor may have changed his residence,

it becomes evident that to lay down the general rule that the schedule must give the name of the creditor and the city and street number of the residence of those living in the largest cities would, in a multitude of cases, destroy the beneficent effect of the Bankruptcy Act.

These schedules are often hurriedly prepared, long after the date of the transaction out of which the debt grew, and when books and papers, which might otherwise have furnished a fuller and more complete address, have been lost or destroyed. Bearing in mind the general purpose of the statute to relieve honest bankrupts; considering that the Act does not expressly require the street address to be stated or the residence to be given unless known; and giving proper legal effect to the Order of Discharge, we hold that a schedule listing the creditor's residence as Indianapolis is, at least, *prima facie* sufficient. In view of this conclusion the judgment of the Appellate Court of Indiana is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE DAY, with whom concurred MR. JUSTICE MCKENNA, dissenting.

I am unable to agree with the conclusion just announced. It seems to me to establish a rule by which many creditors will find their debts paid by a discharge in bankruptcy when they have had no knowledge or means of knowing that such proceedings were pending, and are not able to participate in such dividends as are paid to creditors.

It is admitted in this record that Ferger, the creditor, had a provable claim against Kreitlein in the bankruptcy proceeding. After the institution of this suit, the defendant Kreitlein pleaded his discharge in bankruptcy, and the state court refused to permit it to avail as a defense, because it did not appear that Ferger's debt was properly

scheduled, or that he had been given the notice which the Bankruptcy Act declares shall be given to creditors of the pendency of the proceedings. The fact that Ferger had no notice of the proceedings is not contested. In that situation, under the Act of 1898, in order to bar the claim sued upon, it was essential for the bankrupt to show that he had complied with the act, in so far as he could, by giving or attempting to give Ferger notice of the pendency of the proceedings.

Under the Bankruptcy Act of 1867, creditors who had provable claims were barred by the bankrupt's discharge, although such creditors' names were omitted from the schedules or so incorrectly given that they had no actual notice of the bankruptcy proceedings, unless the omission or incorrect statement was fraudulent or intentional. (See the cases under the former act, collected in Black on Bankruptcy, § 727.)

As this court pointed out in *Birkett* v. *Columbia Bank*, 195 U. S. 345, the Act of 1898 devolved upon the bankrupt certain duties, "all directed to the purpose of a full and unreserved exposition of his affairs, property and creditors." Under § 7, he is required to prepare, make oath to, and file in the court, within ten days, a schedule of his property containing, among other things, "a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to." These schedules were to be in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee. "To the neglect of this duty," this court declared in the *Birkett Case*, "the law attaches a punitive consequence," which is set forth in § 17, and provides that "a discharge in bankruptcy shall release a bankrupt of all of his provable debts, except such as . . . have not been duly scheduled in time for proof and allowance,

with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy. . . ." It follows from this decision that, if a discharge is to have the effect to cancel the debt of a creditor who had no notice of the proceedings, the burden is upon the bankrupt to show a compliance with the Act. The provisions of the Act (§ 21f) making the certified copy of the discharge evidence of the jurisdiction of the court, the regularity of the proceedings and the fact that the order was made, should be read in connection with the provisions of § 17, excepting from the benefit of a discharge claims which the bankrupt has failed to duly schedule.

To this effect are a number of well considered cases in the state courts. In *Columbia Bank* v. *Birkett*, 174 N. Y. 112 (affirmed in 195 U. S. 345) the court, speaking through Judge Gray, said: "While there may be some difficulty in the way of the statutory construction, I think the plaintiff's claim has never been discharged, as the result of the bankruptcy proceedings. In my opinion, there are features in the present Bankruptcy Act which differentiate it from preceding acts and which indicate a legislative intent that greater strictness shall prevail in notifying the creditor of the various proceedings in bankruptcy. It is provided that the voluntary bankrupt must file 'a list of his creditors, showing their residences, if known,' and that notices must be sent to the creditors at 'their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed . . . by the creditors.' While in the previous act of 1841 and 1867, substituted service of notices by publication was provided for, in the present act it is actual notice that is required to be given. The schedule of debts, which the bankrupt is to file with his petition, furnishes the basis for the notices which the referee, or the court, is to give thereafter to the creditors, and thus the bankrupt appears

to be made responsible for the correctness of the list of his creditors. That he is to suffer, in the case of his failure to state the name of the creditor, to whom his debt is due, if known to him, seems to me very clear from the reading of Section 17 of the Act. That excepts from the release of the discharge all debts which 'have not been duly scheduled in time for proof and allowance, with the name of the creditor.' That is very emphatic language, and how is it possible to obviate its effect by the argument that the plaintiff still had time left, after the discharge was granted, to prove his claim? . . . I think it was intended that the decree discharging the voluntary bankrupt should be confined in its operations to the creditors who had been duly listed and who were enabled to receive the notices which the act provides for."

In *Parker* v. *Murphy*, 215 Massachusetts, 72, this question was discussed, and the court said:

"Section 17 of the bankruptcy act provides that a discharge in bankruptcy shall release the debtor from all provable debts 'except such as . . . have not been duly scheduled' . . . unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." Claims are not duly scheduled unless the names of the debtor's 'creditors showing their residences, if known,' are on the list of creditors filed. Section 7, cl. 8. The burden of proving that he did all things required of him under the bankruptcy law to give notice to the respondent creditor of the bankruptcy proceedings or that the latter had actual knowledge of them rests upon the plaintiff [the bankrupt] in this case. *Wylie* v. *Marinofsky*, 201 Massachusetts, 583; *Wineman* v. *Fisher*, 135 Michigan, 604, 608.

"The requirement for duly scheduling the names and residences of creditors is a most important one. It is in compliance with the generally recognized principle that one shall not be barred of his claim without the oppor-

tunity of having his day in court. It is for the benefit of the creditors and in the interest of fair dealing with them and is to be construed in harmony with this purpose. It is essential in order that notices in the bankruptcy proceeding may be sent him. It has been construed with some strictness. *Birkett* v. *Columbia Bank*, 195 U. S. 345; *Custard* v. *Wigderson*, 130 Wisconsin, 412."

In *Custard* v. *Wigderson*, 130 Wisconsin, 412, the court said: "Under the bankruptcy law of 1867 this court held, in harmony with the general current of authority, that a debt is discharged even though not scheduled. . . . But it will be seen that under the act of 1867 debts not scheduled were not excepted from the operation of discharge, while under the bankruptcy act of 1898 they are. . . . This provision is a marked departure from former bankruptcy acts, and decisions, under such acts, to the effect that scheduling was not necessary in order to bring the debt within the order of discharge" are not pertinent. "The words of the present act, however, are plain and unambiguous, and there can be no doubt that they mean what they say; and, if so, unless the debt is duly scheduled in time for proof and allowance, or the creditor had notice or actual knowledge of the proceedings in bankruptcy, it is not affected by the discharge."

In *McKee* v. *Preble*, 138 N. Y. Supp. 915, the schedules had given the address as 212, 9th. Avenue, New York, which was the place of business. Plaintiff's residence was elsewhere, with the correct address given in the city directory, where the bankrupt might have discovered it with a slight effort. The creditor swore he received no notice. The discharge was held ineffective as against this creditor.

In *Cagliostro* v. *Indelle*, 17 A. B. R. 685, the residence, as stated in the schedules, was "Mulberry Street, New York City." Creditor's residence, in fact, was 141 Mulberry Street, where he had resided for fifteen years last past.

This fact appeared in the directory, and could have easily been discovered. It was held that the bankrupt did not use due effort to ascertain the address of the creditor, and the discharge did not affect this debt, the court saying: "I am satisfied that the petitioner, when he made up the schedules, failed to use due efforts to learn the street number of the judgment creditor, and that it was owing to such failure on his part that the judgment creditor received no notice. Such failure deprives him of the right to a discharge of such judgment. *Columbia Bank* v. *Birkett*, 174 N. Y. 112, 9 Am. B. R. 481; *Sutherland* v. *Lasher*, 41 Misc. 249, 11 Am. B. R. 780, affd., 87 App. Div. 633. It may be that, in the absence of other evidence, there is a presumption that the postal authorities would deliver a letter to the plaintiff addressed, simply, 'Mulberry Street,' without any addition of the street number; but such presumption cannot prevail as against the positive statement of the plaintiff that he never received such notice."

It seems to me that the same rule in scheduling creditors cannot be applied to those who reside in large cities, where it may be essential in order that the creditor receive notice that street and number shall be given, as is applied to creditors residing in small communities where the postal authorities may be presumed to know the residence of the creditor by a more general form of address.

If it is sufficient to give the name of the city without more, the bankrupt, when making out his schedules which are to be the basis of informing creditors of the proceedings, may have before him the list of his creditors, and the street and number of their addresses, but being only required to give the name and residence of the creditor, he may omit to state the street and number, although known.

It is true that in view of the efficiency of the postal service such notices may reach the creditor, and may inform him of the proceedings with the consequent opportunity to prove his claim; but, because of the omission of

street and number the notice may fail to reach the creditor, and the estate may be administered and divided without his knowledge or any opportunity to participate in the distribution. It seems to me that the only consistent conclusion in view of the provisions of the present Bankruptcy Act, requires that the consequences of such negligence of the bankrupt be visited upon him and not upon the innocent creditor. If the notice reaches the creditor, well and good; but if not, the loss should fall upon him upon whom the law has placed the burden of complying with the requirement to duly schedule the debt of each creditor, so far as known.

It is a question of due diligence in every case, with the burden of showing such diligence upon the bankrupt, and there is nothing in this case to show that Kreitlein did not know of Ferger's address in Indianapolis, nor is there a showing of diligence on his part to discover what it actually was if in fact it was unknown. In view of their former dealings it is fair to presume that Ferger's address was known to Kreitlein.

Obviously, the same rule may not apply to all places and of course the schedules showing street and number are only to be complied with so far as practicable. "Thus, failure to look in the city directory of a great city, both creditor and bankrupt being residents, is not due scheduling." 3 Remington on Bankruptcy, p. 2504.

"By far the most important schedule is that of creditors. Its purpose is three-fold: (a) to give the court information as to the persons entitled to notice, (b) to inform the trustee as to the claims against the estate and the considerations on which they rest, and (c) to an extent at least, to limit the effect of the bankrupt's discharge to parties to the proceedings. It follows that the requirements of the statute . . . should be strictly observed. . . . The names of creditors should be written with care. . . . Even greater care should be

observed in addresses. Schedules are defective if they do not contain the addresses of creditors, stating street and number, in case the creditors reside in large cities, or unless the schedules show that after diligent effort no better addresses can be obtained. If the residence cannot be ascertained, that fact must be stated, and the proper practice requires that the bankrupt shall state what efforts he has made to ascertain the residence." Collier on Bankruptcy, 9th ed., p. 234. To the same effect is 1 Loveland on Bankruptcy, 4th ed. 374.

It seems to me that in this case there is an utter lack of that diligence to ascertain and state the residence of the creditor which is required to give the discharge the effect of barring this claim.

Indianapolis is a large city. The imperfectly addressed notice never reached Ferger. Moreover Kreitlein had probable knowledge of Ferger's true address or might have obtained it by the exercise of due diligence. In my opinion the judgment of the Indiana court should be affirmed.

MR. JUSTICE MCKENNA concurs in this dissent.

MALLINCKRODT CHEMICAL WORKS *v.* STATE OF MISSOURI, AT THE RELATION OF JONES, CIRCUIT ATTORNEY OF CITY OF ST. LOUIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 187. Argued March 10, 1915.—Decided June 1, 1915.

If it appears from the opinion of the trial court, that the question of equal protection, under the Fourteenth Amendment, was treated as sufficiently raised and specifically dealt with adversely to plaintiff in error, jurisdiction is conferred on this court under § 237, Judicial Code.

Any one seeking to set aside a state statute as repugnant to the Federal Constitution, must show that he is within the class with respect to whom the act is unconstitutional and that the alleged unconstitutional features injure him. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531.

This court will not pass upon the definition of disputed terms in a state statute where that point is not of consequence to plaintiff in error, as in a case where refusal to file a prescribed statement, was based on the general theory that no statement of any kind need be made and not upon the ground of ambiguity of any of the terms used. So *held* as to the expression "trust certificates" in § 10322, Missouri Rev. Stat. 1909.

In advance of any construction of a statute by the courts of the enacting State, this court assumes that those courts will give the act such a construction as will render it consistent with constitutional limitations. *Bechtel* v. *Wilson*, 204 U. S. 36.

Objections to the constitutionality of a state statute requiring the filing of an affidavit on the ground that the prescribed form in the statute is not exactly adapted to every corporation and that the state officers have construed the statute as not permitting any alterations, are too frivolous to need serious attention. In this case neither the statute nor official caution reasonably admits of the construction contended for.

While classification must be reasonable and corporations may not be arbitrarily selected for subjection to a burden to which individuals would as appropriately be subject, there is a reasonable basis for classifying corporations on account of their peculiar attributes in regard to participation in prohibited trusts and combinations.

Section 10322, Missouri Rev. Stat. 1909, requiring officers of corporations to annually file with the Secretary of State, an affidavit in form as prescribed in the statute setting forth the non-participation of the corporation in any pool, trust, agreement or combination under penalty of forfeiture of charter or right to do business in the State is not unconstitutional as depriving the corporation of its property without due process of law or as denying them equal protection of the law on account of any reason involved in this case.

249 Missouri, 702, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of a statute of Missouri requiring corporations to file annually an affidavit of non-

participation in trusts and combinations, are stated in the opinion.

Mr. Shepard Barclay, with whom *Mr. S. Mayner Wallace* and *Mr. William R. Orthwein* were on the brief, for plaintiff in error:

The requirement as to trust certificates is not due process.

The requirement as to date of incorporation is impossible of compliance, and hence is not due process.

The requirement of venue and jurat in "County," when defendant is not domiciled in any county, is not due process.

An unfounded discrimination by presumption of guilt against persons managing corporations while other individuals and partnerships, in like business, and like circumstances, are exempt therefrom amounts to denial of due process of law.

In support of these contentions, see 26 Am. & Eng. Enc. 2d ed., 656; 30 id. 1161; *Barhydt* v. *Alexander*, 59 Mo. App. 192; *Brown* v. *Billington*, 163 Pa. St. 76; *S. C.*, 43 Am. St. 780; *Brown* v. *Jacobs Co.*, 115 Georgia, 429; Bishop, Stat. Crimes, 2d ed., § 41; *In re Coe*, 183 Fed. Rep. 745; *Collins* v. *Kentucky*, 234 U. S. 638; Const'n Missouri, 1875, art. 2, § 23; id. art. 9, §§ 20–25; *Counselman* v. *Hitchcock*, 142 U. S. 547; *Connolly* v. *Pipe Co.*, 184 U. S. 556; *Edelstein* v. *United States*, 149 Fed. Rep. 642; *Ex parte Gauss*, 223 Missouri, 285; *Glickstein* v. *United States*, 222 U. S. 141; *Gracey* v. *St. Louis*, 213 Missouri, 384; *Gulf Ry.* v. *Ellis*, 165 U. S. 150; *Harvester Co.* v. *Kentucky*, 234 U. S. 223; *International Harvester Co.* v. *Kentucky*, 234 U. S. 223, 591; *Insurance Co.* v. *Carnell*, 110 Fed. Rep. 823; Maxwell, Interp. Stats., 4th ed., 577–8; *Mo. Pac. Ry.* v. *Tucker*, 230 U. S. 340; *In re Nachman*, 114 Fed. Rep. 996; *Paddock* v. *Railway*, 155 Missouri, 537; *People* v. *O'Brien*, 176 N. Y. 261; Rev. Stat. Mo. 1909, §§ 3508, 10325;

Raymond v. *Chicago Co.*, 207 U. S. 20; *In re Reboulin*, 165 Fed. Rep. 246; *Railway Co.* v. *Taylor*, 198 Fed. Rep. 159; *Southern Ry.* v. *Greene*, 216 U. S. 412; *Soon Hing* v. *Crowley*, 113 U. S. 709; *State* v. *Skillman*, 209 Missouri, 408; *State* v. *Campbell*, 210 Missouri, 202; *State* v. *Warner*, 220 Missouri, 23; *State* v. *Dillon*, 87 Missouri, 490; *State* v. *Simmons Hardware Co.*, 109 Missouri, 118; *State* v. *Young*, 119 Missouri, 495; *State* v. *Naughton*, 221 Missouri, 425; *State* v. *Ashbrook*, 154 Missouri, 395; *State* v. *Ry. Co.*, 146 Missouri, 175; *Steffen* v. *St. Louis*, 135 Missouri, 44; *Wilmington City Ry.* v. *Taylor*, 198 Fed. Rep. 159; *Ex parte Young*, 209 U. S. 123.

Mr. Lee B. Ewing, Assistant Attorney-General of the State of Missouri, with whom *Mr. John T. Barker*, Attorney-General of the State of Missouri, *Mr. Wm. M. Fitch*, Assistant Attorney-General of the State of Missouri, and *Mr. Shrader P. Howell* were on the brief, for defendant in error:

Only Federal questions will be considered by this court in reviewing judgments of a state court. *Waters-Pierce Co.* v. *Texas*, 212 U. S. 86, 112; *Chicago Ins. Co.* v. *Needles*, 113 U. S. 574, 581; *Barbier* v. *Connelly*, 113 U. S. 27–32; *Armour* v. *Lacy*, 200 U. S. 226, 236.

Whether a state statute is repugnant to the state constitution, does not present a Federal question; the decision of such question belongs wholly to the state court, and its decision is binding on this court. *Re Kemmler*, 136 U. S. 436, 447; *Rassmussen* v. *Idaho*, 181 U. S. 198; *Merchants Bank* v. *Pennsylvania*, 167 U. S. 461; *Layton* v. *Missouri*, 187 U. S. 356, 361; *Morley* v. *Lake Shore Ry.*, 146 U. S. 162, 167.

The proper construction to be given a state statute and the determination of its terms is a matter for the state courts and presents no Federal question. This court will be bound by the interpretation, application and scope of a

state statute, given by the state court of last resort. *Louisiana* v. *Pelsbury*, 105 U. S. 278, 294; *Phœnix Ins. Co.* v. *Gardner*, 11 Wall. 204; *Morley* v. *Lake Shore Ry.*, 146 U. S. 162, 166; *Standard Oil Co.* v. *Tennessee*, 217 U. S. 413; *Smiley* v. *Kansas*, 196 U. S. 447, 454; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 42; *Cargill Co.* v. *Minnesota*, 180 U. S. 452, 466; *International Harvester Co.* v. *Missouri*, 173 U. S. 99, 107; *Hartford Ins. Co.* v. *Railroad Co.*, 175 U. S. 91, 100; *Enfield* v. *Jordon*, 119 U. S. 680; *International Harvester Co.* v. *Missouri*, 234 U. S. 199; *Hammond Pkg. Co.* v. *Arkansas*, 212 U. S. 343.

This court will accept as conclusive the findings of fact made by the state court in this case, and will also accept the finding that such facts constituted a violation of the law as construed by the state court of last resort. *Waters-Pierce Co.* v. *Texas*, 212 U. S. 86, 97, 106; *Thayer* v. *Spratt*, 189 U. S. 346, 353; *Egan* v. *Hart*, 165 U. S. 188; *Smiley* v. *Kansas*, 196 U. S. 447, 454; *Gardner* v. *Bonesteel*, 180 U. S. 162; *Christman* v. *Miller*, 197 U. S. 313; *Chapman* v. *Bigelow*, 206 U. S. 41.

The authority of the General Assembly of the State to pass laws prohibiting agreements or combinations in restraint of trade, or the carrying out in the State of such agreements or combinations, is absolute and complete. *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 210; *Berea College* v. *Kentucky*, 211 U. S. 45, 53; *Waters-Pierce Co.* v. *Texas*, 212 U. S. 86; *Same* v. *Same*, 177 U. S. 28; *Standard Oil Co.* v. *Tennessee*, 217 U. S. 415; *Nat'l Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Smiley* v. *Kansas*, 196 U. S. 447; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 410.

The State has the absolute right and power to prescribe punishment for violations of her anti-trust laws. *International Harvester Co.* v. *Missouri*, 234 U. S. 199; *Waters-Pierce Co.* v. *Texas*, 212 U. S. 86, 111; *Coffey* v. *Harlan Co.*, 204 U. S. 659; *Nat'l Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Repley* v. *Texas*, 193 U. S. 504; *Ohio* v. *Lloyd*, 194 U. S.

445; *Marvin* v. *Trout*, 199 U. S. 212; *Ry. Co.* v. *Hume*, 115 U. S. 512; *Tel. Co.* v. *Indiana*, 165 U. S. 304; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270.

When a state court decides a case upon two grounds—one Federal and one non-federal, this court will not disturb the judgment if the non-federal ground, fairly construed, sustains the decision. *Berea College* v. *Kentucky*, 211 U. S. 45, 53; *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Eustis* v. *Bolles*, 150 U. S. 301; *Giles* v. *Teasley*, 193 U. S. 146, 160; *Allen* v. *Arguimbau*, 198 U. S. 149.

The presumption is always in favor of the validity of a state statute. *Railroad Co.* v. *May*, 194 U. S. 267; *Erb* v. *Marasch*, 177 U. S. 584; *Fisher* v. *St. Louis*, 194 U. S. 361, 371; *Railroad Co.* v. *Richmond*, 96 U. S. 521, 529.

Before a state statute will be annulled by this court as arbitrary or unreasonable and, therefore, in violation of the Federal Constitution, or of the amendments thereto, it must clearly appear to be in violation thereof. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411; *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 210; *Bachtel* v. *Wilson*, 204 U. S. 36.

The State has extremely wide latitude and great power in providing classes which may be subject to legislative enactment, regulation or control, and discretion, when exercised by a State in such matters, will be enforced unless the enforcement thereof would be extremely unjust and clearly in violation of some provision of the Federal Constitution. Such classification may, within certain degrees, discriminate to great length and still be valid under the Federal Constitution. *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 210; *Standard Oil Co.* v. *Tennessee*, 217 U. S. 420; *A., T. & S. F. Ry.* v. *Matthews*, 174 U. S. 96, 106; *Hammond Pkg. Co.* v. *Arkansas*, 212 U. S. 343; *Clark* v. *Kansas City*, 176 U. S. 114, 120; *Home Tel. Co.* v. *Los Angeles*, 211 U. S. 265, 277.

The immunity clause of the Fourteenth Amendment

is purely personal; it has been held that an attorney cannot raise the question for the witness. *Hale* v. *Henkel*, 201 Missouri, 43, 70; *Brown* v. *Walker*, 161 U. S. 596; Best on Evidence, 9th ed., p. 113; 3 Taylor on Evidence, § 1453; 1 Greenleaf on Evidence, 16th ed., § 469d; Philips on Evidence, 4th Am. ed., p. 935; Starkie on Evidence, 10th Am. ed., p. 4; Wigmore on Evidence, § 2263; *Commonwealth* v. *Shaw*, 4 Cush. 594; *State* v. *Wentworth*, 65 Maine, 234, 241.

The Supreme Court of Missouri has approved all questions of procedure in the case at bar. *State* v. *Mallinckrodt Chemical Works*, 249 Missouri, 702; *Tex. & N. O. R. R.* v. *Miller*, 221 U. S. 408, 416.

If the decision of the Missouri Supreme Court has accorded plaintiff in error every right, benefit and privilege guaranteed to it by the United States Constitution, then the judgment must be affirmed by this court. *Berea College* v. *Kentucky*, 211 U. S. 45, 53.

The equal protection of the law as guaranteed by the Fourteenth Amendment, is satisfied if the law applies equally to all persons in like situation and conditions. *Chicago &c. R. R. Co.* v. *Iowa*, 94 U. S. 155, 163; *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 210–214; *Duncan* v. *Missouri*, 152 U. S. 382; *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307; *Williams* v. *Arkansas*, 217 U. S. 79; *Mutual Loan Co.* v. *Martel*, 222 U. S. 225, 233; *Aluminum Co.* v. *Rumsey*, 222 U. S. 251, 255.

Due process of law has been given the plaintiff in error under the Missouri statutes and the proceedings involved in the case at bar as fully as is guaranteed to it by the Federal Constitution; it has been given its day in court after due notice. *Hammond Pkg. Co.* v. *Arkansas*, 212 U. S. 322, 350; *N. & S. Turnpike Co.* v. *Virginia*, 225 U. S. 264, 270; *Twining* v. *New Jersey*, 211 U. S. 79; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270; *Jordan* v. *Commonwealth*, 225 U. S. 167; *Jacob* v. *Roberts*, 223 U. S. 261;

American Land Co. v. *Zeiss*, 219 U. S. 47; *Paddell* v. *New York*, 211 U. S. 446, 450; *Blinn* v. *Nelson*, 222 U. S. 1.

No provision of the Federal Constitution is violated by the Missouri statute, which requires an affidavit of innocence to be furnished by all domestic corporations in Missouri when such affidavit is not required by persons or partnerships engaged in the same or similar lines of business with such corporations. *Mutual Loan Co.* v. *Martel*, 222 U. S. 225, 233; *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 210; *Berea College* v. *Kentucky*, 211 U. S. 45, 53; *Hammond Pkg. Co.* v. *Arkansas*, 212 U. S. 322, 343; *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307.

The Supreme Court of Missouri, on appeal, is confined to the matters presented in the first instance to the lower court, and also to the theory of the case as presented to the lower court. *Ice Co.* v. *Kuhlmann*, 238 Missouri, 685, 705; *State ex rel. McQuillin*, 246 Missouri, 586, 592; *Dougherty* v. *Dougherty*, 239 Missouri, 649, 659.

A constitutional question which may have been raised by demurrer or answer, and not so raised, but presented to the lower court for the first time by motion in arrest is raised out of time and does not confer jurisdiction on the Supreme Court. *Dubowsky* v. *Binggeli*, 258 Missouri, 197, 202; *Howell* v. *Sherwood*, 242 Missouri, 513.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an action brought by the State of Missouri, at the relation of the Circuit Attorney of the City of St. Louis, against the Mallinckrodt Chemical Works (a Missouri corporation), to forfeit its charter for failure of its officers to file with the Secretary of State in the year 1910 the affidavit prescribed by § 10322, Missouri Rev. Stat. 1909, setting forth the non-participation of defendant in any pool, trust, agreement, combination, etc. The Supreme Court of the State affirmed a judgment of forfeiture (249 Missouri, 702), and the case is brought here

upon the contention that the statute as thus enforced is repugnant to the Fourteenth Amendment of the Constitution of the United States in that it denies to defendant and its managing officers the equal protection of the laws and deprives them of property without due process of law.

There is a motion to dismiss, based upon the ground that the Federal questions here set up were not raised in the trial court, or in the Supreme Court of the State, with sufficient definiteness to comply with § 237, Jud. Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1156.) It appears, however, from the opinion of the Supreme Court (249 Missouri, 704 (8), 733), that the question of equal protection under the Fourteenth Amendment was treated as being sufficiently raised, and was specifically dealt with and ruled against plaintiff in error. This is sufficient to confer jurisdiction upon this court, and the motion to dismiss must be denied. *Nor. Car. R. R.* v. *Zachary*, 232 U. S. 248, 257.

Section 10322, Missouri Rev. Stat. 1909 (enacted in this form in 1907, Laws, p. 374), is set forth in full in the margin.[1] It forms part of Article III of chapter 98, which

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[1] SEC. 10322. SECRETARY OF STATE TO MAKE INQUIRY—FORM OF AFFIDAVIT.—It shall be the duty of the secretary of state, on or about the first day of July of each year, to address to the president, secretary or managing officer of each incorporated company in this State, a letter of inquiry as to whether the said corporation has all or any part of its business or interest in or with any trust, combination or association of persons or stockholders, as named in the preceding provisions of article I of this chapter, and to require an answer, under oath, of the president, secretary or managing officer of said company. A form of affidavit shall be enclosed in said letter of inquiry, as follows:

AFFIDAVIT.

State of Missouri, } ss.
County of——— }

I, ——, do solemnly swear that I am the —— (president, secretary or managing officer) of the corporation known and styled ——, duly

relates to "Pools, Trusts, Conspiracies, and Discriminations." Article I of the same chapter contains sections prohibiting combinations in restraint of trade or competition, and the like, under prescribed penalties. But in the present case the Supreme Court held (249 Missouri, 726–

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incorporated under the laws of ——, on the —— day of ——, 19—, and now transacting or conducting business in the State of Missouri, and that I am duly authorized to represent said corporation in the making of this affidavit, and I do further swear that the said ——, known and styled as aforesaid, is not now, and has not at any time within one year from the date of this affidavit, created, entered into, become a member of or participated in any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm; and that it has not entered into or become a member of or a party to any pool, trust, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm; and that it has not issued and does not own any trust certificates, and for any corporation, agent, officer or employé, or for the directors or stockholders of any corporation, has not entered into and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which said combination, contract or agreement would be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or prevent, restrict or diminish the manufacture or output of any article; and that it has not made or entered into any arrangement, contract or agreement with any person, association of persons or corporation designed to lessen or which tends to lessen full and free competition in the importation, manufacture or sale of any article, product or commodity in this State, or under

729) that Article III is complete in itself and independent of Article I, and has for its object the discouragement of the formation of pools, etc., and requires a disclosure of existing combinations by the filing of annual affidavits under the penalty of forfeiture of the charter or certificate of incorporation, or of the right or privilege to do business in the State, "even though the company may never have

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the terms of which it is proposed, stipulated, provided, agreed or understood that any particular or specified article, product or commodity shall be dealt in, sold or offered for sale in this State to the exclusion, in whole or in part, of any competing article, product or commodity.

_____,

(President, secretary or managing officer.)

Subscribed and sworn to before me, a —— within and for the county of ——, this —— day of ——, 19—.

(Seal) _____

And thereupon it shall become the duty of such corporation to make answer to such inquiry by filing or causing to be filed the affidavit prescribed herein. And on refusal to make oath in answer to said inquiry, or on failure to do so within thirty days from the mailing thereof, the secretary of state shall certify said fact to the prosecuting attorney of the county or the circuit attorney in the city of St. Louis, wherein said corporation is located, and it shall be the duty of such prosecuting attorney or circuit attorney, at the earliest practicable moment, in the name of the State, and at the relation of said prosecuting or circuit attorney, to proceed against such corporation for the forfeiture of its charter or certificate of incorporation, or its right or privilege to do business in this State: *Provided, however*, that if such corporation shall file the affidavit required by the provisions of this article prior to the rendition of final judgment in said action, the court may assess against such corporation, in lieu of a judgment forfeiting its charter or certificate of incorporation, or its right or privilege to do business in this state, a fine not to exceed five thousand dollars and not less than one hundred dollars: *Provided, however*, that any time before final judgment, if such corporation shall file or cause to be filed with the secretary of state the affidavit herein prescribed, the trial court may, in his discretion, and for good cause shown, upon the payment of all costs, together with the attorney's fees of ten dollars, to be paid to the prosecuting attorney or the circuit attorney in the city of St. Louis, remit the penalty herein prescribed. (Laws 1907, p. 374.)

entered into any such pool, trust, conspiracy or combination mentioned in the first article."

It appears that on or about July 1, 1910, the Secretary of State, in obedience to the requirements of § 10322, addressed to the president of plaintiff in error a proper letter of inquiry, requiring an answer under oath, and inclosing the form of affidavit prescribed by that section, and that the corporation willfully failed and refused to make answer by filing or causing to be filed the affidavit. Proof of these facts was held sufficient to sustain the judgment of forfeiture.

Assuming, without deciding, that all of the grounds upon which the validity of § 10322 is here attacked were properly saved in the state courts, we will discuss them in their order.

(1) It is insisted that the statute is repugnant to the "due process" clause, in that it requires an oath of the corporation's officer that the corporation "has not issued and does not own any trust certificates," without explaining or defining the term "trust certificates," or otherwise indicating the meaning of the requirement or limiting it to such certificates as are declared unlawful by the statute. It is very plain, however, that the term "trust certificates" in the prescribed affidavit must be construed in the light of § 10306, found in Art. I of the same chapter, which declares:

"It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employé, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees,

with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article. (Laws 1907, p. 377.)"

The evident purpose of that part of the affidavit to which the present criticism relates is to require an assurance under the oath of a responsible officer of the corporation that the provisions of § 10306 have not been violated.

The Century Dictionary gives as a specific definition of the commercial term "trust" the following: "An organization for the control of several corporations under one direction by the device of a transfer by the stockholders in each corporation of at least a majority of the stock to a central committee or board of trustees, who issue in return to such stockholders respectively certificates showing in effect that, although they have parted with their stock and the consequent voting power, they are still entitled to dividends or to share in the profits—the object being to enable the trustees to elect directors in all the corporations, to control and suspend at pleasure the work of any, and thus to economize expenses, regulate production, and defeat competition. In a looser sense the term is applied to any combination of establishments in the same line of business for securing the same ends by holding the individual interests of each subservient to a common authority for the common interests of all."

We need not adopt this or any other precise definition of the disputed term, for if the legislative meaning be doubtful in this respect there is nothing in the record to show that this is of the least consequence to plaintiff in error. From the undisputed evidence it appears that the refusal to file the affidavit was based upon the general theory that the corporation was not obliged to make any such disclosure as is required by § 10322, and not upon the ground of any ambiguity respecting the term "trust cer-

tificate." As has been often pointed out, one who seeks to set aside a state statute as repugnant to the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544, and cases cited.

And it is to be assumed, in the absence of any construction of the statute by the courts of the State, that those courts will adopt such a construction as will render the enactment consistent with constitutional limitations. *Bachtel* v. *Wilson*, 204 U. S. 36, 40.

The present case is altogether different from *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, and *Collins* v. *Kentucky*, 234 U. S. 634, for there the local statutes had already been construed by the highest court of the State, and, so construed, were held by this court to prescribe no standard of conduct that it was possible to know, and to violate the fundamental principles of justice embraced in the conception of due process of law in compelling men on peril of indictment to guess what their goods would have brought under other conditions not ascertainable.

(2) It is said that § 10322, as applied to plaintiff in error, is inconsistent with due process of law because it prescribes "an inflexible and immutable form of affidavit," and that the form transmitted to plaintiff in error was accompanied with official instructions that it "will not be accepted if any changes or erasures are made in the form;" and that the statutory form includes in the jurat the year "19—," and hence is not applicable to corporations organized, as plaintiff in error was, prior to the year 1900. The objection hardly merits serious treatment. It might as well be said that the blanks in the affidavit could not be filled up without departing from the form prescribed by the legislature. Of course, neither the stat-

ute nor the official caution reasonably admits of any such construction.

(3) A similar contention is based upon the circumstance that the prescribed form of affidavit "has a venue and jurat in a county," whereas plaintiff in error is located and transacts business in the City of St. Louis, which under the constitution and laws of Missouri is not part of any county. This is sufficiently answered by what we have just said; but we may add that, as pointed out in the opinion of the Missouri Supreme Court (249 Missouri, 732), § 8057, Rev. Stat. 1909, which prescribes rules for the construction of statutes, provides that "whenever the word 'county' is used in any law, general in its character to the whole State, the same shall be construed to include the City of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially applicable to such city."

(4) It is insisted that to require an affidavit of innocence by the managing officers of corporations is an unjust discrimination against them, and hence repugnant to the "equal protection" provision, because individuals, partnerships, and associations of individuals, although equally within the law against monopolies (§§ 10299, 10303) are not required to make similar exculpatory affidavits. The question is whether, for the purpose of such a disclosure as is required by § 10322, corporations may be placed in one class and individuals in another. The answer is not at all difficult. Of course, corporations may not arbitrarily be selected in order to be subjected to a burden to which individuals would as appropriately be subject. Classification must be reasonable; that is to say, it must be based upon some real and substantial distinction having a just relation to the legislative object in view. But here, as in other questions of alleged conflict with constitutional requirements, every reasonable intendment is in favor of the validity of the legislation

under attack. Corporations, unlike individuals, derive their very right to exist from the laws of the State; they have perpetual succession; and they act only by agents, and often under circumstances where the agency is not manifest. The legislature may reasonably have concluded that, for these and other reasons, corporations are peculiarly apt instruments for establishing and effectuating those trusts and combinations against which the prohibition of the statute is directed, that their business affiliations are not so easily discovered and traced as those of individuals, and that there was therefore a peculiar necessity and fitness in annually requiring from each corporation a solemn assurance of its non-participation in the prohibited practices. The Act is, in this respect, fairly within the wide range of discretion that the States enjoy in the matter of classification. *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642, 650, and cases cited.

Judgment affirmed.

ATCHISON, TOPEKA & SANTA FÉ RAILWAY COMPANY *v.* VOSBURG.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 189. Submitted March 10, 1915.—Decided June 1, 1915.

Legislation requiring the prompt furnishing of cars by carriers and the prompt loading of same by shippers and prescribing damages and penalties for failure on the part of either, is properly within the police power of the State; in that respect such legislation differs from that which simply imposes penalties on the carrier for failure to pay a specified class of debts. *Gulf, Col. & S. F. Ry.* v. *Ellis*, 165 U. S. 150, distinguished.

A police regulation is, the same as any other statute of the State, subject to the equal protection clause of the Fourteenth Amendment.

That guarantee, while not preventing proper classification, does entitle all persons and corporations within the jurisdiction of the State to the protection of equal laws, including police regulations.

A state statute which imposes reciprocal burdens on both carrier and shipper, but which provides that in the case of delinquency on the part of the carrier the shipper may recover an attorney fee, but in the case of delinquency on the part of the shipper does not provide that the carrier may recover an attorney fee, denies the carrier the equal protection of the law guaranteed by the Fourteenth Amendment.

Such a classification is not a reasonable one and there is no ground on which a special burden should be imposed on one class of litigants and not on another class identically situated.

89 Kansas, 114, reversed.

THE facts, which involve the constitutionality of the reciprocal demurrage law of Kansas of 1905 under the equal protection provision of the Fourteenth Amendment, are stated in the opinion.

Mr. Gardiner Lathrop, Mr. Robert Dunlap, Mr. William R. Smith and *Mr. William Osmond* for plaintiff in error.

Mr. Arthur M. Jackson and *Mr. Wilber E. Broadie* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The Federal question involved in this case is concisely stated in the opening paragraph of the opinion of the Supreme Court of Kansas (89 Kansas, 114), whose judgment we have under review:

"Chapter 345 of the laws of 1905, as amended by chapter 275 of the laws of 1907 [Gen. Stat. 1909, § 7201 *et seq.*], concerns the furnishing of cars by railway companies to shippers of freight. When cars applied for under this statute are not duly furnished, the railway company is liable to the shipper for all actual damages suffered, for a penalty of five dollars per day for each car not supplied, and for a

reasonable attorney fee. Shippers who fail to use cars placed at their disposal are subject to a penalty for their detention, but are not liable for attorney fees. The plaintiff [Vosburg] recovered a judgment against the defendant for a violation of this statute, including an attorney fee, and the defendant appeals on the ground that the provision relating to attorney fees denies it the equal protection of the law guaranteed by the Federal Constitution."

Upon a review of certain decisions of this court, viz., *Gulf, Colorado & Santa Fé Ry.* v. *Ellis*, 165 U. S. 150; *Atchison, Topeka &c. Railroad* v. *Matthews*, 174 U. S. 96; *Fidelity Mutual Life Assoc.* v. *Mettler*, 185 U. S. 308, and *Farmers' &c. Ins. Co.* v. *Dobney*, 189 U. S. 301, the state court held (p. 130), that since the Act in question is a police regulation prescribing duties properly enforceable by penalties in the form of per diem forfeits and attorney fees recoverable in suitable actions, and because of the control of railroad companies over their cars, their capacity to disturb and obstruct trade, and the helplessness of shippers when cars are carelessly or arbitrarily withheld, railroad companies might properly be placed in a class by themselves for the purpose of securing sufficient car service, and that the equal protection of the law required no more than that all railway companies should be penalized alike. The court, in conclusion, said: "It is true that shippers may offend somewhat by failing to make expeditious use of cars when furnished them. Whether or not they too shall be penalized, and if so to what extent, is a fit subject for legislative consideration. But the railroad companies cannot [complain] if the legislature chooses to exempt shippers from any punishment, or chooses to prescribe some penalty suitable to the nature of their delinquency, but different from that imposed upon the companies themselves."

The enactment in question is commonly called the "reciprocal" or "mutual" demurrage law. (82 Kansas, 260;

85 Kansas, 282.) It provides that a railway company failing to furnish cars upon proper application shall pay, to the party applying, "five dollars per day for each car failed to be furnished as exemplary damages, . . . and all actual damages that such applicant may sustain for each car failed to be furnished, together with reasonable attorney-fees." At the same time it requires the applicant to load the cars within 48 hours after they are placed, "and upon failure to do so he shall pay to the company the sum of five dollars per day for each car not used, while held subject to the applicant's order. . . . And if the said applicant shall not use such cars so ordered by him, and shall so notify the said company or its agent, he shall forfeit and pay to the said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the said applicant to use said cars."

We agree that this legislation is properly to be regarded as a police regulation, and in that respect differs from the act that was under consideration in the *Ellis Case*, *supra*, which simply imposed a penalty upon railroad corporations for a failure to pay certain debts. But we cannot at all agree that a police regulation is not, like any other law, subject to the "equal protection" clause of the Fourteenth Amendment. Nothing to that effect was held or intimated in any of the cases referred to. The constitutional guaranty entitles all persons and corporations within the jurisdiction of the State to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation. Thus, in *Atchison, Topeka &c. R. R. Co.* v. *Matthews*, *supra*, the responsibility imposed upon railroad companies for attorneys' fees in addition to damages was sustained

because designed to enforce care on the part of those companies to prevent the communication of fire and the destruction of property along their lines,—a duty imposed upon them and not upon the owners of the property. We need not review the decisions; the subject being so familiar that extended discussion is unnecessary.

The precise question now presented is: What is there in the object of the legislation under consideration that furnishes a ground of distinction between railway company and shipper upon which it is reasonable to say that the latter should be allowed to recover attorney fees when it successfully sues the former, and not *vice versa?* The statute recognizes that the duty of the company to promptly furnish cars, and the duty of the shipper to promptly use them, are reciprocal, and for a breach of either duty the delinquent is penalized in favor of the other party in precisely the same amount—five dollars per day per car. The shipper may also recover his actual damages, if any. The company recovers actual damages, in addition to the penalty, only under special circumstances. No complaint is now made that this is a denial of equal protection, and we lay no stress upon it. But the statute clearly recognizes that either party may be obliged to sue the other in order to recover the penalty, or damages, or both. No reason is suggested, and none occurs to us, why the railroad company, when plaintiff in such an action, will not require the services of an attorney as well as the shipper when he is plaintiff. There is nothing in the nature of the cause of action that renders the burden of preparation more onerous, as a rule, to the shipper when he is plaintiff than to the company when it is plaintiff. There is nothing discernible, therefore, in the purposes of the legislation—which are: to require the prompt furnishing of cars for use, and the prompt use of cars when furnished, and to redress a disregard of either of these requirements by suit when necessary—to give ground for a distinction granting at-

torney's fees to the shipper when he sues, and denying attorney's fees to the company when it sues. In short, it is erroneous to test the classification by its supposed relation to the object of securing adequate car service, because it really relates rather to the object of securing adequate prosecution in court of actions respecting car service.

In *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642, 650, we had under consideration a Texas statute respecting claims of certain classes against persons or corporations doing business in the State, which provided that if any such claim were not paid within a limited time after presentation, suit might be instituted thereon, and if plaintiff obtained judgment for the full amount of the claim as presented he should recover the amount claimed and costs, and in addition a reasonable amount as attorney's fees. In sustaining the act we said (p. 650): "If the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the 'equal protection' clause. This is not a discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued. *Actor* and *reus* differ in their respective attitudes towards a litigation; the former has the burden of seeking the proper jurisdiction and bringing the proper parties before it, as well as the burden of proof upon the main issues; and these differences may be made the basis of distinctive treatment respecting the allowance of an attorney's fee as a part of the costs." (Citing *Atchison, Topeka &c. Railroad* v. *Matthews*, 174 U. S. 96; and *Farmers' &c. Ins. Co.* v. *Dobney*, 189 U. S. 301.)

The present case is essentially different, for in the Kansas statute the distinction is not rested upon the fact that the plaintiff, whether shipper or company, has a special burden in the litigation that may reasonably be compen-

sated by allowance of attorney's fees; on the contrary, the Act, while recognizing the existence of such burden, allows compensation for it in favor of one class of litigants, but does not allow like compensation to the other class when subjected to the like burden. This, in our opinion, is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

ROSSI *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

No. 193. Argued March 11, 1915.—Decided June 1, 1915.

A State may not punish one who sells and delivers liquor in original packages within the State pursuant to orders solicited within the State but delivered from without the State, under the circumstances of this case which arose prior to the Webb-Kenyon Law.

The transportation of intoxicating liquor, as of other merchandise, from State to State is interstate commerce and cannot be interfered with by the States except as permitted by Congress.

The Wilson Act of 1890, while placing liquor on arrival at destination under the law of the State, does not subject liquor transported in interstate commerce to state regulation until after arrival at destination and delivery to the consignee or purchaser.

Under the Wilson Act the power of the State does not extend to a shipment of liquor prior to delivery to the purchaser because it was transmitted in pursuance of an order previously obtained within the State, where, as in Pennsylvania, there is no statute prohibiting the solicitation and taking of such orders for liquor without a license. *Delamater* v. *South Dakota*, 205 U. S. 93, distinguished.

Pa. Sup. Ct. 210, reversed.

THE facts, which involve the validity under the commerce clause of the Federal Constitution of a conviction for selling liquor without a state license, and the construction of the Wilson Act of 1890, are stated in the opinion.

Mr. H. C. McClintock for plaintiff in error.

Mr. Thomas W. Dickey, with whom *Mr. Clyde V. Ailey* was on the brief, for defendant in error:

Section 15 of the Statute of Pennsylvania, commonly called the Brooks Law, applies as the sale took place in Pennsylvania.

The sale must be made in the county where the defendant holds a license and in the regular course of business.

The plaintiff in error had no license to sell liquors in Lawrence County, Pennsylvania, and the orders were not taken in the regular course of business.

The contract was made in Lawrence County, they were to be there executed, and the goods were delivered, as by contract required, in Lawrence County, Pennsylvania. These facts stamp the transactions as sales in the County of Lawrence, State of Pennsylvania. *Commonwealth* v. *Holstine*, 132 Pa. St. 357; *Commonwealth* v. *Guinzburg*, 46 Pa. Sup. Ct. 488; *Norfolk & Western Ry. Co.* v. *Sims*, 191 U. S. 441.

The Brooks Act was enacted in the exercise of the police powers of the Commonwealth of Pennsylvania.

The sales made by the plaintiff in error were not exempt from the police power of the State of Pennsylvania, because of the commerce clause of the Constitution of the United States, and notwithstanding the provisions of the Wilson Act. The Wilson Act does not prevent, but assists the State of Pennsylvania in exercising its rights under the police powers of the State. *Phillips* v. *Mobile*, 208 U. S. 478; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 446;

Reymann Brew. Co. v. *Brister*, 179 U. S. 445; *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17, 25; *Delamater* v. *South Dakota*, 205 U. S. 93; *Commonwealth* v. *Zelt*, 138 Pa. St. 627.

If plaintiff in error be correct, a person may take out a license on or near the Ohio state line, go into any part of the State of Pennsylvania, take verbal orders for any amount of liquors and deliver the same, by person or by wagon or by his agent, collect the purchase price in the State of Pennsylvania, thus making sales in Pennsylvania without any of the police powers of the State being able to regulate, restrain or prohibit him from so doing. This clearly is beyond the power of Congress to regulate interstate commerce.

While Congress has the power to regulate commerce the States may validly affect commerce in the exercise of their inherent and inalienable police power and under the taxing power. *Munn* v. *Illinois*, 94 U. S. 135; *Bowman* v. *Chicago & N. W. R. R.*, 125 U. S. 465; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Commonwealth* v. *Paul*, 170 Pa. St. 284; *Plumley* v. *Massachusetts*, 155 U. S. 461.

The Wilson Act gives the right to the State of Pennsylvania to exercise its police powers on intoxicating liquors transported into the State, remaining therein for use, consumption, sale or storage therein and upon the arrival of such liquor in this State.

Soliciting is a part of the sale. *Lang* v. *Lynch*, 38 Fed. Rep. 489; *Brown* v. *Wieland*, 116 Iowa, 711; *Delamater* v. *South Dakota*, 205 U. S. 93.

Mr. Justice Pitney delivered the opinion of the court.

Plaintiff in error was convicted in the Court of Quarter Sessions of Lawrence County, in the State of Pennsylvania, of the crime of selling intoxicating liquors in that county without a license, contrary to § 15 of an act of May 13,

1887 (P. L. p. 113), which declares: "Any person who shall hereafter be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquors, or any admixture thereof, without a license, shall be sentenced," etc. The Superior Court affirmed the conviction (53 Pa. Sup. Ct. 210), the Supreme Court of the State refused an appeal, and this writ of error was allowed.

The facts are these: Plaintiff in error is a liquor dealer having his place of business in the County of Mahoning, in the State of Ohio, which immediately adjoins Lawrence County, Pennsylvania. He had no license to sell in Lawrence County, nor any place of business there, but went into that county and there took an order for liquor, with the understanding that the liquor should be thereafter delivered from his stock in Ohio to the residence of the purchaser in Pennsylvania. He returned to Ohio, there loaded the goods upon his own wagon, and either by himself or his employé drove across the state line and delivered the liquor to the residence of the purchaser pursuant to the contract. Thus the sale was negotiated in Pennsylvania, but contemplated and required for its fulfillment a transaction in interstate commerce, which afterwards took place, with resulting delivery in Pennsylvania.

The charge, as will be observed, was selling, not offering for sale. And it is admitted that by the Pennsylvania decisions the act of taking orders for future delivery is not punishable under the statute cited, or any other, and that it is not the making of an executory contract but the executed sale that is punishable. *Commonwealth* v. *Smith*, 16 Pa. Co. Ct. 644, 646, 647; *Star Brewing Company's License*, 43 Pa. Sup. Ct. 577, 580; *Commonwealth* v. *Guinzburg*, 46 Pa. Sup. Ct. 488, 497; and see *Garbracht* v. *Commonwealth*, 96 Pa. St. 449, 453. And so, in the present case, the Superior Court (53 Pa. Sup. Ct. 220) recognized that it was not the making of the executory contract, but

the execution of it, that involved a violation of the law of the State.

The Federal question presented is whether, under the act of Congress approved August 8, 1890 (c. 728, 26 Stat. 313), known as the Wilson Act, the State of Pennsylvania may punish plaintiff in error for delivering in that State liquors transported in interstate commerce, under the circumstances stated. The case arose before the passage of the act of March 1, 1913 (c. 90, 37 Stat. 699), known as the Webb-Kenyon Act, and the effect of this legislation is therefore not now involved.

As has been recently pointed out in *Kirmeyer* v. *Kansas*, 236 U. S. 568, 572, the transportation of intoxicating liquor, as of other merchandise, from State to State, is interstate commerce, and state legislation which penalizes it or directly interferes with it, otherwise than as permitted by an act of Congress, is in conflict with the commerce clause of the Federal Constitution; and while Congress, in the Wilson Act, declared in substance that liquors transported into any State or remaining therein for use, consumption, etc., shall upon arrival in such State be subject to the operation and effect of its laws enacted in the exercise of the police power, to the same extent and in the same manner as though the liquors had been produced in such State, and shall not be exempt therefrom by reason of being introduced in original packages, this does not subject liquors transported in interstate commerce to state regulation until after their arrival at destination and delivery to consignee or purchaser. *Leisy* v. *Hardin*, 135 U. S. 100, 110; *Rhodes* v. *Iowa*, 170 U. S. 412, 423; *American Express Co.* v. *Iowa*, 196 U. S. 133, 142, 143; *Louis. & Nash. R. R.* v. *Cook Brewing Co.*, 223 U. S. 70, 82.

The Pennsylvania Superior Court deemed that the present case was controlled by *Delamater* v. *South Dakota*, 205 U. S. 93, where a statute imposing an annual license charge upon the business of selling or offering for sale

intoxicating liquors within the State by traveling salesmen soliciting orders was held to be enforceable in view of the Wilson Act, even as applied to the business of soliciting, within the borders of the State, proposals for the purchase of liquors which were to be consummated by the delivery within the State of liquors to be brought from without. That case, however, has no present pertinency, since the prohibition of the Pennsylvania statute is not addressed to the business of soliciting contracts for the purchase of liquor, but to the sale of the liquor itself; and by the terms of the Wilson Act, as previously construed, the control of this subject by the several States is postponed until after the delivery of the liquor within the State.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CHICAGO & ALTON RAILROAD COMPANY *v.* TRANBARGER.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 214. Argued March 19, 1915.—Decided June 1, 1915.

In an action for damages under the statute of Missouri requiring owners of railroads to maintain ditches along the right-of-way as amended in 1907 so as to require outlets for water across the rights-of-way and imposing liability and penalties for non-compliance within three months after completion and where the embankment causing damage had been erected more than three months prior to the amendment of 1907, *held* that:

The amendment to the statute was not an *ex post facto* law: it did not penalize the railroad company for the manner in which it originally built the embankment prior to the amendment but for the manner in which it maintained it subsequently thereto.

The time limit should properly be construed as relating to railroads

erected after the passage of the act and that, as to those already constructed reasonable time should be allowed.

It is not necessary for this court to determine what is a reasonable time for compliance with a police regulation, when that question is raised by one refusing compliance, not on that ground, but on the ground that the legislature had no power to enact the statute.

Even though the charter be irrepealable, common-law rules existing at the time the charter was granted are not so imported into the contract of the charter as to cause such contract to be impaired by subsequent enactment of proper police regulations.

No person has a vested right in any general rule of law or policy of legislation entitling him to insist upon its remaining unchanged for his benefit, nor is immunity from change of general rules of law to be implied as an unexpressed term of an express contract.

The police power of the State cannot be abdicated nor bargained away, is inalienable even by express grant, and all contract and property rights are held subject to its fair exercise; it embraces regulations designed to promote public convenience or general welfare as well as those in the interest of the public health, morals or safety.

A statute requiring owners of a railroad to provide means for passing water under embankments is a legitimate exercise of the police power and not a taking of their property without compensation. It amounts merely to an application of the maxim *sic utere tuo ut alienum non lædas*.

The enforcement of uncompensated obedience to legitimate police regulation is not a taking of property without compensation or without due process of law in the sense of the Fourteenth Amendment.

Although water may, under common-law rules, be a common enemy to all property, embankments of railroads, stretching across tracts of land that are liable to injury from surface water, differ from other constructions sufficiently to afford a substantial ground for classification and a statute otherwise legal is not unconstitutional under the equal protection provision of the Fourteenth Amendment because it applies exclusively to railroad embankments, whether the road be owned by individuals or corporations.

250 Missouri, 46, affirmed.

THE facts, which involve the constitutionality under the due process and impairment of contract provisions of the Federal Constitution of a statute of Missouri requiring owners of railroads to afford outlets for water across their rights of way, are stated in the opinion.

Mr. Elliott H. Jones, with whom *Mr. William C. Scarritt* and *Mr. Charles M. Miller* were on the brief, for plaintiff in error:

The Act of Missouri, of March 14, 1907, is an *ex post facto* law; it also impairs the contract between State and railroad. The act takes property without due process or compensation.

The police power of a State does not justify act of 1907 nor is the act a proper exercise of police.

The police power of the State is subject to constitutional limitations.

In support of these contentions see *Abbott* v. *Railroad*, 83 Missouri, 271, 280; *Anderson* v. *Kerns Drainage District*, 14 Indiana, 199; *Bailey* v. *Railroad Co.*, 4 Harr. (Del.) 389; Cooley on Const. Lim., p. 835; *Coster* v. *Tide Water Co.*, 18 N. J. Eq. 54; *Collier* v. *Railway Co.*, 48 Mo. App. 398; *Calder* v. *Bull*, 3 Dall. 386; *Clark* v. *Railway Co.*, 36 Missouri, 202; *Chicago &c. R. R.* v. *Chicago*, 166 U. S. 226; *Chicago &c. R. R.* v. *Chappell*, 124 Michigan, 72; *Chicago &c. R. R.* v. *Grimwood*, 200 U. S. 561; *Chicago* v. *Jackson*, 196 Illinois, 496; *Chronic* v. *Pugh*, 136 Illinois, 539; *Duncan* v. *Missouri*, 152 U. S. 377; *Dartmouth College* v. *Woodward*, 4 Wheat. 656; *Davidson* v. *New Orleans*, 96 U. S. 97; *Edwards* v. *Kearzy*, 96 U. S. 595; 3 Elliott on Railroads, § 937; *Fletcher* v. *Peck*, 6 Cranch, 137; *Fleming* v. *Hull*, 73 Iowa, 598; Freund on Police Power, §§ 511, 512; *Gifford Drainage Dist.* v. *Shroer*, 145 Indiana, 572; *Havemeyer* v. *Iowa Co.*, 70 U. S. (3 Wall.) 294; *Harrelson* v. *Railway*, 151 Missouri, 482; *Holden* v. *Hardy*, 169 U. S. 366; *Re Theresa Drainage District*, 90 Wisconsin, 301; *Re Cheesebrough*, 78 N. Y. 232; *Jones* v. *Railway*, 84 Missouri, 151; *Kenney* v. *Railroad*, 69 Mo. App. 569; *Lake Erie & W. R. R.* v. *Commonwealth*, 63 O. St. 23; *Lathrop* v. *Racine*, 110 Wisconsin, 461; *Lien* v. *Norman Co.*, 80 Minnesota, 58; *McCormick* v. *Railroad*, 57 Missouri,

433; *Muhlker* v. *N. Y. & H. R. R.*, 197 U. S. 544; *Moss* v. *Railway*, 85 Missouri, 89; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312; *Re Tuthill*, 163 N. Y. 136; *McQuillen* v. *Hatton*, 42 Ohio, 202; *Paddock* v. *Somes*, 102 Missouri, 226; *Payson* v. *People*, 75 Illinois, 276; *Ready* v. *Railroad*, 98 Mo. App. 467; *Railway* v. *Hough*, 61 Michigan, 507; *Schneider* v. *Railway*, 29 Mo. App. 68, 71; *Sloan* v. *Railroad*, 61 Missouri, 24; *United States* v. *Cent. Pac. R. R.*, 118 U. S. 235; *Walla Walla* v. *Water Co.*, 172 U. S. 1; *Burgess* v. *Salmon*, 97 U. S. 381; *Calloway County* v. *Foster*, 93 U. S. 570; *C., B. & Q. Ry.* v. *Drainage Commrs.*, 200 U. S. 561; *Jones* v. *Hannovan*, 55 Missouri, 462; *Land & Stock Co.* v. *Miller*, 170 Missouri, 252; *Matthews* v. *Railroad*, 121 Missouri, 298; 161 U. S. 1; *Parish* v. *M., K. & T. R. R.*, 63 Missouri, 284; *Skinner* v. *Railway*, 254 Missouri, 228; *Sarls* v. *United States*, 156 U. S. 570; *Wood* v. *Smith*, 114 Missouri, 180; *State* v. *Board of Trustees*, 175 Missouri, 52; *State ex rel. Circuit Atty.* v. *Railroad*, 48 Missouri, 468; *St. Joseph & Iowa Ry.* v. *Shambaugh*, 106 Missouri, 557, 569; *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Harris*, 177 U. S. 305; *Watson* v. *Mercer*, 8 Pet. (U. S.) 110; *Wilson* v. *Railroad*, 64 Illinois, 542.

Mr. Charles M. Hay, with whom *Mr. Thomas T. Fauntleroy* and *Mr. Patrick H. Cullen* were on the brief, for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

Tranbarger, owner of 60 acres of farming land in Callaway County, Missouri, brought this action against the Railroad Company in a Missouri state court to recover damages and a penalty under § 1110 of the Missouri Revised Statutes of 1899, as amended by act of March 14, 1907, Sess. Acts, p. 169, of which the portion now pertinent is as follows:

"It shall be the duty of every corporation, company or person owning or operating any railroad or branch thereof in this State, and of any corporation, company or person constructing any railroad in this State, within three months after the completion of the same through any county in this State, to cause to be constructed and maintained suitable openings across and through the right of way and roadbed of such railroad, and suitable ditches and drains along each side of the roadbed of such railroad, to connect with ditches, drains, or water-courses, so as to afford sufficient outlet to drain and carry off the water, including surface water, along such railroad whenever the draining of such water has been obstructed or rendered necessary by the construction of such railroad; . . . and any corporation, company or person failing to comply with the provisions of this section shall incur a penalty not to exceed five hundred dollars, and be liable for all damages done by said neglect of duty."

A judgment for damages and a penalty of one hundred dollars was sustained by the Supreme Court of the State (250 Missouri, 46), and the case comes here upon questions respecting the validity of the statute, as construed and applied, in view of familiar provisions of the Federal Constitution.

The facts found by the Missouri Supreme Court to be within the pleadings and proofs and to be sustained by the verdict of the jury are these: Plaintiff's lands lie in what are known as the Missouri River bottoms. It is the habit of that river to overflow the bottoms from the west to the east in times of high water. Defendant's railroad extends across the bottoms from southwest to northeast, and along the easterly boundary of plaintiff's land. The roadbed is constructed of a solid earth embankment, varying in height from four to seven feet, and is not provided with traverse culverts, openings, or drains of any kind for the escape of surface water, but constitutes a solid barrier

for collecting such waters, and causes them to back over and flood plaintiff's lands, which would not be overflowed except for that obstruction. The road was maintained in this condition for more than three months before a stated day in June, 1908, when the River overflowed its banks and the water ran across the bottoms until it reached the railroad embankment, which repelled it, so that it backed over, upon, and flooded plaintiff's land, causing substantial damage, which was attributable solely to the negligent failure of defendant to construct suitable openings across and through the solid embankment upon which its railroad tracks were laid, and suitable ditches and drains along the side of the roadbed, to connect with an existing ditch which would have afforded an outlet into the River or elsewhere without flooding plaintiff's land. It further appears from undisputed evidence cited in the brief of plaintiff in error that the railroad was constructed about the year 1872, and originally was carried by a trestle for a distance of 20 to 25 feet over a certain low spot in the river bottom, but that this opening was filled in about the year 1895, since which time the railroad bed has been maintained as a solid embankment across the bottom.

The statutory requirement of "openings across and through the right of way and roadbed" originated in the 1907 amendment of § 1110. Before that, and dating from the year 1874, the statute merely required railroads to construct ditches along each side of the roadbed. [Laws 1874, p. 121; Rev. Stat. 1879, § 810; Laws 1883, p. 50; Rev. Stat. 1889, § 2614; Laws 1891, p. 82; Rev. Stat. 1899, § 1110; *Collier* v. *Chicago & Alton Ry.* (1892), 48 Mo. App. 398, 402; *Kenney* v. *Kansas City &c. R. R.* (1897), 69 Mo. App. 569, 571.] It is upon the clause added in 1907 that the present action is founded, and upon that clause the questions before us are raised. It is attacked as an *ex post facto* law, as a law impairing the obligation of the contract between the State and the Railroad Company,

and as repugnant to the "due process" and "equal protection" provisions of the Fourteenth Amendment.

(1) The argument that in respect of its penalty feature the statute is invalid as an *ex post facto* law is sufficiently answered by pointing out that plaintiff in error is subjected to a penalty not because of the manner in which it originally constructed its railroad embankment, nor for anything else done or omitted before the passage of the act of 1907, but because after that time it maintained the embankment in a manner prohibited by that act. The argument to the contrary is based upon a reading of the section that applies the limiting clause "within three months after the completion of the same" to railroads already in existence as well as to those to be constructed thereafter. The result is, according to the argument, that as the road of plaintiff in error was constructed upon a solid embankment at least as early as the year 1895, the act was violated as soon as enacted. This construction is so unreasonable that we should not adopt it unless required to do so by a decision of the state court of last resort. The language of the section as it now stands: "It shall be the duty of every corporation . . . owning or operating any railroad or branch thereof in this State, and of any corporation . . . constructing any railroad in this State, within three months after the completion of the same through any county in this State, to cause to be constructed and maintained suitable openings," etc., seems to us to be more reasonably construed as prescribing the express limit of three months only with respect to railroads afterwards constructed, and as allowing to railroads already in existence a reasonable time after the passage of the enactment within which to construct the openings. In adopting this meaning, we have regard not merely to the phrases employed, but to the previous course of legislation, which is set forth in the briefs but need not be here repeated. Whether we are

right or wrong about this, the duty to construct transverse outlets having originated with the act of 1907, the statute is of course to be construed as allowing some time—either three months, or a reasonable time more or less than that period—for their construction by railroads already in existence. The law had been upon the statute books for more than a year before the flood that gave rise to this action. Whether three months, or a year, was a reasonable time, or whether more time would reasonably be required for the construction of the prescribed opening across the railroad of plaintiff in error at the place in question, is a matter that we need not determine, since no such issue was raised in the state courts, plaintiff in error having contented itself with asserting that the legislature had no power to require it at any time after the act of 1907 to construct such an opening.

(2) Upon the question of impairment of contract, it appears that the railroad in question was constructed and afterwards leased to plaintiff in error in perpetuity by virtue of a charter and franchise granted to the Louisiana & Missouri River Railroad Company in the year 1870 (Laws, p. 93, §§ 22, 23, 43), by § 33 of which the company was exempted from the provisions of § 7 of Article I of the general corporation act of 1855 (Rev. Stat. 1855, p. 371), and thereby, it is claimed, relieved from the legislative power of alteration, suspension, and repeal. And while by the constitution of 1865 (in force at the time the railroad in question was authorized and constructed), railroad corporations could be formed only under general laws subject to amendment or repeal, it is contended that this did not apply to subsequent amendments of charters previously granted (*State, ex rel. Circuit Attorney* v. *Railroad*, 48 Missouri, 468; *St. Joseph & Iowa Ry.* v. *Shambaugh*, 106 Missouri, 557, 569), and it is pointed out that the charter of 1870 is an amendment of one enacted in 1868 (Laws, p. 97), and this in turn an amendment of

one enacted in 1859 (Laws 1859, 1st Sess., p. 400). It is further insisted that even if the State reserved to itself by the constitution of 1865 the right to alter or amend the corporate charter, this was relinquished when the constitution of 1875 went into effect, which contains no similar reservation. And hence, it is argued that, as applied to this company, the act of 1907 cannot be sustained as a charter amendment. This is disputed; but for present purposes we will assume the charter was irrepealable.

Next, it is insisted that for all purposes except those covered by the act of 1907, Missouri has at all times adhered to the common-law rule that surface water is a common enemy, against which every landowner may protect himself as best he can, and that this applies to and protects railroads as well as other landowners. *Abbott* v. *Kansas City &c. Ry.* (1884), 83 Missouri, 271, 280 *et seq.*; *Jones* v. *St. Louis &c. Ry.*, 84 Missouri, 151, 155; *Schneider* v. *Missouri Pacific Ry.*, 29 Mo. App. 68, 72; *Ready* v. *Missouri Pacific Ry.*, 98 Mo. App. 467. The conclusion sought to be drawn is that the common-law rule, as it existed at the time the railroad was built and the right of way acquired, entered into the contract between the State and the company, and into the contracts between the company and the landowners from whom its right of way was acquired, and that the immunity from prosecution and from private action alike was in the nature of an appurtenance to the land, the enjoyment of which could not be impaired by subsequent legislation.

Of the cases cited in support of this contention the only one that has a semblance of pertinency is *Muhlker* v. *Harlem Railroad Co.*, 197 U. S. 544, and this is readily distinguishable. There the right in question was the easement of light and air, which of course pertains closely to the use and enjoyment of the land. But the right to maintain a railroad embankment or other artificial structure in such a manner as to deflect surface water from its

usual course, and thereby injure the land of another, has little reference to the substantial enjoyment of the railroad right of way. Nor is it at all essential to the protection of the railroad itself from surface water. It cannot reasonably be contended that a railroad cannot be maintained and operated as safely and as conveniently over a bridge, trestle, culvert, or other opening calculated to admit the passage of surface water, as upon a solid embankment, or that there is any substantial advantage in favor of the latter except that it avoids the expenditure necessary to be made for the construction and maintenance of openings in order that the embankment shall no longer be the occasion of injury to the lands of others. The previous immunity from responsibility for such injury was nothing more than a general rule of law, which was not in terms or by necessary intendment imported into the contract. For just as no person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit (*Munn* v. *Illinois*, 94 U. S. 113, 134; *Hurtado* v. *California*, 110 U. S. 516, 532; *Buttfield* v. *Stranahan*, 192 U. S. 470, 493; *Martin* v. *Pittsburg &c. R. R.*, 203 U. S. 284, 294), so an immunity from a change of the general rules of law will not ordinarily be implied as an unexpressed term of an express contract. See *Gross* v. *United States Mortgage Co.*, 108 U. S. 477, 488; *Pennsylvania R. R.* v. *Miller*, 132 U. S. 75, 83.

(3) But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the State for the general benefit of the community at large and for the purpose of preventing unnecessary and wide-spread injury to property.

It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution

has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, 558, and cases cited. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety. *Lake Shore & Mich. Southern Ry.* v. *Ohio*, 173 U. S. 285, 292; *C., B. & Q. Ry.* v. *Drainage Commissioners*, 200 U. S. 561, 592; *Bacon* v. *Walker*, 204 U. S. 311, 317.

We deem it very clear that the act under consideration is a legitimate exercise of the police power, and not in any proper sense a taking of the property of plaintiff in error. The case is not at all analogous to those which have held that the taking of a right of way across one's land for a drainage ditch, where no water-course exists, is a taking of property within the meaning of the Constitution. The present regulation is for the prevention of damage attributable to the railroad embankment itself, and amounts merely to an application of the maxim *sic utere tuo ut alienum non lædas*. Of course, compliance with it involves the expenditure of money; but so does compliance with regulations requiring a railroad company to keep its roadbed and right of way free from combustible matters; to provide its locomotive engines with spark arresters; to fence its tracks; to provide cattle guards and gates at crossings, or bridges or viaducts, or the like. Such regulations as these are closely analogous in principle, and have been many times sustained as constitutional. *Minneapolis Railway Co.* v. *Beckwith*, 129 U. S. 26, 31; *Minneapolis & St. Louis Railway* v. *Emmons*, 149 U. S. 364, 367; *St. Louis & San Francisco Ry.* v. *Mathews*, 165 U. S.

1; *Chicago &c. Ry.* v. *Minneapolis*, 232 U. S. 430, 438; *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, 560, 561.

And it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of the Fourteenth Amendment. *Chicago, Burlington &c. R. R.* v. *Chicago*, 166 U. S. 226, 255; *New Orleans Gas Co.* v. *Drainage Comm.*, 197 U. S. 453, 462; *C., B. & Q. Ry.* v. *Drainage Commissioners*, 200 U. S. 561, 591.

(4) The contention that the statute in question denies to plaintiff in error the equal protection of the laws is not seriously pressed, and is quite unsubstantial. Railroad embankments, stretching unbroken across tracts of land that are liable to injury from surface waters, differ so materially from other artificial constructions and improvements to which the doctrine of the "common enemy" applies, that there is very plainly a substantial ground for classification with respect to the object of the legislation. The statute applies alike to corporations, companies, and persons owning or operating railroads that are so constructed as to obstruct the flow of drainage and surface waters, and we deem it unexceptionable in this regard.

Judgment affirmed.

UNITED STATES *v.* RABINOWICH.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 748. Argued April 7, 1915.—Decided June 1, 1915.

A conspiracy, having for its object the commission of an offense denounced by the Bankruptcy Act, is not in itself an offense arising under that act within the meaning of § 29a thereof, and the one year period of limitation prescribed by that section, does not apply.

A conspiracy to commit a crime, as defined in and punished by § 37, Criminal Code (§ 5440, Rev. Stat.) is a different offense from the crime that is the object of the conspiracy.

Mere conspiracy, without an overt act done in pursuance of it, is not criminally punishable under § 37, Criminal Code.

Quære, whether the crime of concealing from the trustee, property belonging to the bankrupt estate, as defined in § 29b (1) of the Bankrupt Act can be perpetrated by any one other than a bankrupt or one who has received a discharge as such.

In construing the criminal statutes involved in this action, this court attributes to Congress, in the absence of any inconsistent expression, a tacit purpose to maintain a long established and important distinction between offenses essentially different.

THE facts, which involve the construction of § 29 b of the Bankruptcy Act and § 37 of the Criminal Code (§ 5440, Rev. Stat.) in regard to conspiracies to commit crimes against the United States, are stated in the opinion.

Mr. Assistant Attorney-General Warren for the United States:

The context of § 29 of the Bankruptcy Act shows that only the offenses enumerated therein are to be deemed "offenses arising under" that act within the meaning of subdivision d of § 29 of said act.

The offense of conspiracy, as defined by Rev. Stat., § 5440 (§ 37, Penal Code), although the object of such conspiracy be the commission of an offense defined and made punishable by the Bankruptcy Act (30 Stat. 544, 554,) is not an "offense arising under" the Bankruptcy Act, but a separate and distinct offense.

A person may be guilty of conspiring to commit an offense against the United States although he could not himself commit the objective offense.

The object of the conspiracy need not be consummated; and in the case of a conspiracy to commit the offense of concealing, while a bankrupt, property of the bankrupt estate from the trustee, it is not necessary to aver or prove

either that bankruptcy proceedings were instituted or that a trustee was actually appointed.

It is no objection that the conspiracy may be punished more severely than the objective offense, for the offenses are separate, and the evils to be guarded against are distinct.

The parties to the conspiracy may be prosecuted, even though the objective offense at which the conspiracy aimed shall have been accomplished. The liability for conspiracy is not taken away by its success.

The conspiracy is not merged where both the conspiracy and the offense which is its object are misdemeanors, or where both are felonies.

Acquittal upon the charge of conspiracy to commit an offense against the United States does not bar a prosecution for the objective offense.

Upon the same principle an indictment which charges the defendants with conspiracy to commit two different offenses is not duplicitous.

The decision of this case will affect not only prosecutions for conspiracy to commit an offense under the Bankruptcy Act, but also prosecutions for conspiracy to commit offenses under other acts containing special statutes of limitations, applicable to offenses arising thereunder. The existence of different periods of limitation for different offenses makes impossible the application of the doctrine of the *Samuels Case*, the adoption of which would create great confusion.

In support of these contentions, see *In re Adams*, 171 Fed. Rep. 599; *Alkon* v. *United States*, 163 Fed. Rep. 810; *Berkowitz* v. *United States*, 93 Fed. Rep. 452; *Clune* v. *United States*, 159 U. S. 590; *Cohen* v. *United States*, 157 Fed. Rep. 651; *Gantt* v. *United States*, 108 Fed. Rep. 61; *Greene* v. *United States*, 154 Fed. Rep. 401; *Heike* v. *United States*,, 227 U. S. 131; *Houston* v. *United States*, 217 Fed. Rep. 852; *Hyde* v. *United States*, 225 U. S. 347; *John*

Gund Co. v. *United States*, 206 Fed. Rep. 386; *Kaufman* v. *United States*, 212 Fed. Rep. 613; *Rabinowitz* v. *United States*, Mar. 9, 1915, unreported; *Radin* v. *United States*, 189 Fed. Rep. 568; *Roukous* v. *United States*, 195 Fed. Rep. 353; *Ryan* v. *United States*, 216 Fed. Rep. 13; *Thomas* v. *United States*, 156 Fed. Rep. 897; *United States* v. *Andem*, 158 Fed. Rep. 996; *United States* v. *Bayer*, 24 Fed. Cas. 1046; *United States* v. *Brace*, 143 Fed. Rep. 703; *United States* v. *Burkett*, 150 Fed. Rep. 208; *United States* v. *Cassidy*, 67 Fed. Rep. 698; *United States* v. *Cohn*, 142 Fed. Rep. 983; *United States* v. *Comstock*, 162 Fed. Rep. 416; *United States* v. *Cook*, 17 Wall. 168; *United States* v. *Gordon*, 42 Fed. Rep. 829; *United States* v. *Hirsch*, 100 U. S. 33; *United States* v. *Holte*, 236 U. S. 140; *United States* v. *Lyman*, 190 Fed. Rep. 414; *United States* v. *Phillips*, 196 Fed. Rep. 574; *United States* v. *Richards*, 149 Fed. Rep. 443; *United States* v. *Samuels*, 1914, Unreported; *United States* v. *Sanche*, 7 Fed. Rep. 715; *United States* v. *Scott*, 139 Fed. Rep. 697; *United States* v. *Stephenson*, 215 U. S. 200; *United States* v. *Thomas*, 145 Fed. Rep. 74; *Williamson* v. *United States*, 207 U. S. 425.

Mr. William R. Harr, with whom *Mr. Charles H. Bates* was on the brief, for defendant in error:

The decision of the District Court is in accord with the purpose of Congress, as expressed in the Bankruptcy Act itself, in respect to the period of limitation for the prosecution of offenses growing out of the passage of that act, and a ruling to the contrary would defeat that purpose.

The manifest purpose of Congress in § 29d of the Bankruptcy Act was to cast into oblivion, after the lapse of one year, all offenses having their source in that act. Hence the broad language of § 29 d. *United States* v. *Phillips*, 196 Fed. Rep. 574; *Warren* v. *United States*, 199 Fed. Rep. 753; § 332, Crim. Code; *Kaufman* v. *United States*, 212 Fed. Rep. 613.

A conspiracy to commit an offense against the United States cannot arise unless there is a statute creating said offense; hence it is that statute, rather than the conspiracy statute, which gives rise to the conspiracy offense.

The controlling fact is not, as the Government contends, that conspiracy to commit an offense against the United States is separate and distinct from the offense which is the object of the conspiracy. The question still remains whether said conspiracy offense arises under the Bankruptcy Act within the meaning of the special statute of limitations contained therein.

The bar of the bankruptcy statute is not limited to offenses which are enumerated or fully defined in the Bankruptcy Act, but extends to all offenses arising under that act.

The provisions of the Bankruptcy Act must be included in the description of the conspiracy offense and hence form a component part of said conspiracy offense.

An indictment for conspiracy to commit an offense denounced by the Bankruptcy Act must contain every allegation necessary to sustain an indictment for the commission of the substantive offense which is the object of the conspiracy. *United States* v. *Comstock*, 162 Fed. Rep. 415.

The offense of conspiring to have a bankrupt fraudulently and knowingly conceal his property from the trustee in bankruptcy not only arises under the Bankruptcy Act but is part and parcel of it, as fully as if expressly written therein.

Nothing would be added to the Bankruptcy Act now if Congress should amend the act by making it an offense for two or more persons to conspire to conceal the property of the bankrupt from the trustee. That provision is already, in effect, part and parcel of the bankruptcy law.

This is a case for the application of the principle that where there is a general and a special statute dealing with

the same subject the special statute controls. *Williams* v. *United States*, 168 U. S. 389; *Phillips* v. *Grand Trunk Western Ry.*, 236 U. S. 662.

United States v. *Hirsch*, 100 U. S. 33, relied on by the plaintiff in error, was a case of conspiracy to defraud the Government, and the hypothesis upon which that decision rests is not applicable to conspiracies to commit an offense against the United States.

While there is some diversity of opinion among the lower Federal courts, the best reasoned cases hold that the special statute of limitations contained in the Bankruptcy Act applies to the offense of conspiring to violate the provisions of that statute. *United States* v. *Samuels*, 000 Fed. Rep. 000; *United States* v. *Comstock*, 162 Fed. Rep. 416; *United States* v. *Hirsch*, 100 U. S. 33.

The decision of the District Court tends to produce greater uniformity in the administration of the criminal laws.

It is clearly more in accord with the impartial administration of justice to hold that a conspiracy to commit an offense—which means simply an agreement to commit some specific act which the law does not wish done—shall be barred from prosecution when the act itself, if committed, is barred. *United States* v. *Irvine*, 98 U. S. 450; *United States* v. *Kissell*, 218 U. S. 607; *Heike* v. *United States*, 227 U. S. 144; *Brown* v. *Elliott*, 225 U. S. 404, distinguished.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a writ of error, taken under the criminal appeals act of March 2, 1907 (c. 2564, 34 Stat. 1246), to review a judgment of the District Court sustaining, on demurrer, a special plea in bar to an indictment for conspiracy found June 24, 1912, and based upon § 37 of the Criminal Code of March 4, 1909 (c. 321, 35 Stat. 1088, 1096), formerly

§ 5440, Rev. Stat. The indictment embraces six individuals, including defendant in error, and contains two counts, of which the first recites that three of the defendants, K., R., and F., were doing business as co-partners, and had on hand a large quantity of goods; that they and the other named defendants contemplated and planned that the co-partners should commit an act of bankruptcy, an involuntary petition in bankruptcy should be filed against them, they should be adjudged bankrupts, and thereafter a trustee in bankruptcy should be appointed; and avers that, under these circumstances, the defendants named, including K., R., and F., conspired and agreed together that K., R., and F. should conceal, while bankrupts, from the trustee of the estate in bankruptcy, certain specified property belonging to said estate in bankruptcy. Overt acts are alleged. The second count differs in its recitals, but does not differ in any respect now material in setting forth the conspiracy. In each count the conspiracy and overt acts are stated to have taken place in March and April, 1911, more than a year before the finding of the indictment. Neither count avers a continuing conspiracy. The plea sets up the alleged bar of the statute of limitations contained in § 29 d of the Bankruptcy Act (c. 541, 30 Stat. 554), in that the indictment was not found within one year after the commission of the alleged offenses. The District Court held, upon a construction of the applicable statutes, that the prosecution upon the charges contained in the indictment was limited by the section thus invoked, and not by § 1044, Rev. Stat.

The pertinent statutory provisions are set forth in the margin.[1] Section 1044, which of course antedated the

[1] Section 37 of the Criminal Code is as follows:

SEC. 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such con-

Bankruptcy Act, declares that no person shall be prosecuted for any offense (with exceptions not now material), unless the indictment is found or information instituted within three years next after such offense shall have been committed; while § 29 d of the Bankruptcy Act limits to one year the prosecution "for any offense arising under this Act." The narrow question presented is, whether a conspiracy having for its object the commission of an offense denounced as criminal by the Bankruptcy Act is in itself an offense "arising under" that Act, within the meaning of § 29 d.

It is apparent from a reading of § 37, Crim. Code (§ 5440, Rev. Stat.), and has been repeatedly declared in decisions of this court, that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. *Callan* v. *Wilson*, 127 U. S. 540, 555; *Clune* v. *United States*, 159 U. S. 590, 595; *Williamson* v. *United States*, 207 U. S. 425, 447; *United States* v. *Stevenson*

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spiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

Section 29 of the Bankruptcy Act, so far as material, is as follows:

b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; . . .

d A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Section 1044 of the Revised Statutes as amended April 13, 1876, is as follows:

No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section one thousand and forty-six, [referring to the revenue laws] unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial or punishment for any offense, barred by the provisions of existing laws.

(No. 2), 215 U. S. 200, 203. And see *Burton* v. *United States*, 202 U. S. 344, 377; *Morgan* v. *Devine*, 237 U. S. 632. The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable. *Williamson* v. *United States*, *supra*. And it is punishable as conspiracy, though the intended crime be accomplished. *Heike* v. *United States*, 227 U. S. 131, 144.

Nor do we forget that a mere conspiracy, without overt act done in pursuance of it, is not criminally punishable under § 37, Crim. Code. *United States* v. *Hirsch*, 100 U. S. 33, 34; *Hyde* v. *Shine*, 199 U. S. 62, 76; *Hyde* v. *United States*, 225 U. S. 347, 359. There must be an overt act; but this need not be of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy. *United States* v. *Holte*, 236 U. S. 140, 144; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 535, 536. Nor need it appear that all the conspirators joined in the overt act. *Bannon* v. *United States*, 156 U. S. 464, 468. A person may be guilty of conspiring although incapable of committing the objective offense. *Williamson* v. *United States*, *supra*; *United States* v. *Holte*, *supra*. And a single conspiracy might have for its object the violation of two or more of the criminal laws, the substantive offenses having perhaps different periods of limitation. (See *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 547, 548, for an instance of a conspiracy with manifold objects.)

It is at least doubtful whether the crime of concealing property belonging to the bankrupt estate from the trustee, as defined in § 29 b (1) of the Bankruptcy Act, can be perpetrated by any other than a bankrupt or one who has received a discharge as such. Counsel for defendant in error refers to § 1, subdivision 19, of the Act, which gives the following definition: "(19). 'Persons'

shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations." But the Circuit Court of Appeals for the Eighth Circuit has held that this does not broaden the interpretation of § 29 b (1) and that present or past bankruptcy is an attribute of every person who may commit the offense therein denounced. *Field* v. *United States*, 137 Fed. Rep. 6. And see *Kaufman* v. *United States*, 212 Fed. Rep. 613, 617.

But, if there be doubt about this, we are not now called upon to solve it. For, as appears from what has been said, the defendants here accused include six individuals, only three of whom (not including defendant in error) were the owners of the property that was to be unlawfully concealed; and the conspiracy, as alleged in each count, was that these three, and they only, should, while bankrupt, conceal the property. Of course, an averment that the others were parties to the conspiracy is by no means equivalent to an averment that they were to participate in the substantive offense. And so we have the typical case of a conspiracy that is in every way distinct from the contemplated crime that formed its object.

Defendant in error, while conceding, for the purposes of the argument, that the conspiracy and the substantive offense are separate and distinct, insists that the question still remains whether such a conspiracy offense as is here charged "arises under" the Bankruptcy Act, within the meaning of the special statute of limitations contained therein. The argument is that this bar is not by its terms limited to offenses enumerated or fully defined in the Act, but extends to all offenses "arising under" it; that without a law creating the substantive offense of

"concealing," etc., a conspiracy to do the acts contemplated by the present defendants would not be a crime; and hence, that it is this law, rather than the conspiracy statute, which "gives rise" to the conspiracy offense.

The argument is ingeniously elaborated, but it has not convinced us. We deem it more reasonable to interpret "any offense arising under this Act" as limited to offenses created and defined by the same enactment. In reaching this conclusion, we have not merely had regard to the proximity of the clause to the context, but have attributed to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different; a distinction whose practical importance in the criminal law is not easily overestimated.

We cannot agree that there is anything unreasonable, or inconsistent with the general policy of the Bankruptcy Act, in allowing a longer period for the prosecution of a conspiracy to violate one of its penal clauses than for the violation itself. For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

United States v. *Hirsch*, 100 U. S. 33, 34, 35, is in principle quite like the case at bar. There the indictment contained four counts, of which the first and second, drawn under § 5440, Rev. Stat., charged a conspiracy to defraud the United States out of the duties on certain merchandise theretofore imported and there-

after to be imported. The other counts were drawn under § 5445, and charged the entry of goods at the custom house by fraudulent invoice and false classification. The question was as to the validity of a plea that the offenses charged had been committed more than three years before the finding of the indictment, and this turned upon whether § 1044 applied, or § 1046, which prescribed a limitation of five years for a prosecution "for any crime arising under the revenue laws." This court held that with respect to the first two counts the three-year limitation prescribed by § 1044 was applicable, saying: "Specific acts which are violations of the laws made to protect the revenue may be said to be crimes arising under the revenue laws, as are those in the third and fourth counts; but a conspiracy to defraud the Government, though it may be directed to the revenue as its object, is punishable by the general law against all conspiracies, and can hardly be said, in any just sense, to arise under the revenue laws." This was said in spite of the fact, pointed out in the opinion, that § 5440 was originally § 30 of the act of March 2, 1867 (c. 169, 14 Stat. 471, 484), which was a revenue law.

It is not necessary to extend the discussion. In our opinion, a conspiracy to commit an offense made criminal by the Bankruptcy Act is not of itself an offense "arising under" that Act within the meaning of § 29 d, and hence the prosecution is not limited by that section.

Judgment reversed, and the cause remanded for further proceedings in accordance with this opinion.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

PYLE, TRUSTEE IN BANKRUPTCY OF STEELE, MILLER & COMPANY, *v.* TEXAS TRANSPORT & TERMINAL COMPANY.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Nos. 226, 227, 228, 229, 230. Argued April 16, 19, 1915.—Decided June 1, 1915.

Whether the one receiving property from the bankrupt before the petition has cause to believe that he was receiving, and that it was intended to give to him, a preference is a matter of fact, and in an action to recover the property the burden of proof is upon the trustee.

In this case, parties who had advanced money on forged bills of lading in the belief that they represented the goods actually moving from designated points of shipment and had, just before the petition, received from the bankrupt genuine bills of lading representing the same goods, physical possession of which was in the carriers issuing the genuine bills, were entitled to possession of the goods; and, under the circumstances of this case, the substitution of the genuine, for the false, bills did not amount to an illegal preference under the Bankruptcy Act.

203 Fed. Rep. 1023, affirmed.

THE facts, which involve the right of a trustee in bankruptcy to maintain an action for the recovery of property of the bankrupt and what constitutes a preference under that Act. are stated in the opinion.

Mr. Wm. C. Dufour, with whom *Mr. W. J. Lamb*, *Mr. H. Generes Dufour* and *Mr. George Janvier*, were on the brief, for appellant:

The preference was an unfair one.

The French bankers considered conditions abnormal. The time of preference and the relations of Scheuch & Co. show that there was a preference.

The whole cotton world had been placed on guard by Knight, Yancey failure.

"Kiting," such as occurred in this case, is first sign of insolvency.

The security given up was worthless and the substitution of good security amounted to a preference.

In support of these contentions, see *Alexander* v. *Redmond*, 180 Fed. Rep. 96; 24 Am. & Eng. Enc. 1066; *The Carlos F. Roses*, 177 U. S. 671; *Coleman* v. *Decatur Egg Co.*, 186 Fed. Rep. 136; 2 Cyc. 565; *First Natl. Bank* v. *Abbott*, 165 Fed. Rep. 853; *Forbes* v. *Howe*, 3 A. B. R. 475; *S. C.*, 102 Massachusetts, 427; *In re Gesas*, 146 Fed. Rep. 734; *Great Western Mfg. Co.*, 152 Fed. Rep. 123; *Hentz* v. *Lovell*, 192 Fed. Rep. 762; *Re Hoghton Web Co.*, 185 Fed. Rep. 213; *Hoover* v. *Maher*, 51 Minnesota, 53; *Lewis* v. *Julius*, 212 Fed. Rep. 225; *Lovell* v. *Newman*, 192 Fed. Rep. 753; *Re Manning*, 123 Fed. Rep. 180; *Re McDonald*, 178 Fed. Rep. 487; *Obiter Iron Co.* v. *Rolling Mill Co.*, 125 Fed. Rep. 794; *Parker* v. *Black*, 143 Fed. Rep. 561; *Re Reese Brick Co.*, 131 Fed. Rep. 643; Remington on Bankruptcy, page 774; *The St. Jose Indiano*, 1 Wheat. 208; *Sawyer* v. *Turpin*, 91 U. S. 114, 120; *Soisson* v. *First Nat'l Bank*, 131 Fed. Rep. 643; *Stewart* v. *Platt*, 101 U. S. 731; *Re Deuschle*, 182 Fed. Rep. 435; *Re Virginia Hardwood Co.*, 139 Fed. Rep. 209.

Mr. Victor Leovy, with whom *Mr. George Denegre* and *Mr. Joseph Paxton Blair* were on the brief, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

These causes, begun at the same time, were tried and decided together in the United States District Court, Eastern District of Louisiana (192 Fed. Rep. 725), and also in the Circuit Court of Appeals (203 Fed. Rep. 1023).

The original bills, except as to details concerning times, amounts, etc., are essentially identical; by stipulation the evidence in each one became part of the record in the others; and all the appeals may be conveniently considered in a single opinion.

The proceedings were instituted August 18, 1910, by Pyle, Trustee in bankruptcy of Steele, Miller & Company, to recover 2,494 bales of cotton in custody of an ocean carrier at New Orleans, transfer of which by the bankrupts to appellee banks, acceptors of their twenty-five drafts aggregating $183,048.46 it is alleged, constituted a preference voidable under §§ 60-*a* and 60-*b* of the Bankrupt Law (c. 541, 30 Stat. 544, 562) as it stood after amendments of February 5, 1903 (c. 487, 32 Stat. 797, 799, 800), and prior to June 25, 1910 (c. 412, 36 Stat. 838, 842). These sections are copied in the margin.[1]

Steele, Miller & Company were merchants at Corinth, Mississippi, engaged in exporting cotton. Scheuch & Company were merchants and importers domiciled at

[1] SEC. 60-*a*. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

SEC. 60-*b*. If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

Havre, France. The Bank de Mulhouse, Comptoir D'Escompte de Mulhouse, Societe Generale, and Credit Havrais are French banks doing business at Havre; and Paul Chardin is a banker and cotton merchant of that city. The Compagnie Generale Transatlantique is an ocean carrier. It owned the steamship *Texas;* and Texas Transport & Terminal Company was its agent at New Orleans.

In 1909 the bankrupts engaged to consign large quantities of cotton to Scheuch & Company for sale, and the latter on their own responsibility arranged for reimbursement credits with the banks, who, according to established trade custom, undertook to accept drafts drawn on themselves by consignors for value of shipments when accompanied by proper bills of lading, insurance papers, etc.—"all necessary documents." In the honest course Steele, Miller & Company delivered 100 bales of cotton to a railroad carrier for through shipment to Havre taking therefor a bill of lading to their own order containing marks, number of bales, etc., and direction to notify Scheuch & Company. The bill with accompanying documents was then annexed to a draft for the consignment's approximate market price, addressed to the Havre bank and specifying (marks being changed to meet the circumstances) "value received and charge to account R. D. A. R. 1/100 bales cotton." This was discounted and ultimately accepted and paid. Upon arrival at Havre the drawee bank received and held the cotton until reimbursed by Scheuch & Company.

Finding themselves in financial difficulties Steele, Miller & Company prior to September, 1909, began to forge and use through railroad bills of lading resembling genuine ones in all respects. Having utilized one of these to procure discount of a draft they would thereafter assemble 100 bales marked with a combination of four letters identically as designated in the false instrument, forward

these to New Orleans, and there deliver them to an ocean carrier receiving a port or ocean bill of lading to their own order bearing the same identifying marks, etc. The genuine bill would then be sent by mail to Scheuch & Company with instructions to deliver to the bank holding corresponding forged one and return the latter. Such requested exchanges were made through a considerable period, the banks having been satisfied by a plausible explanation that bankrupts had made some arrangement with the carriers and that shipments were thus expedited, given through Scheuch & Company who, although at first ignorant of the frauds, were fully informed as early as March, 1910.

During December, 1909, and January and February, 1910, the bankrupts drew the twenty-five drafts—each for about $7,300, approximate market value of 100 bales—here involved on the separate appellee banks, attaching to each a fictitious through railroad bill of lading; and in due course these were accepted and paid in entire good faith. Prior to April 6, 1910, while insolvent, the bankrupts assembled in Mississippi and Tennessee the number of bales specified by the several forged bills marked as therein stated, shipped them to New Orleans and there delivered them to the Compagnie Generale Transatlantique for transportation to Havre. The ocean carrier issued to bankrupts for each 100 bales a port or ocean bill with same marks, etc.; and placed cotton aboard the *Texas*. The bankrupts promptly endorsed the genuine bills and forwarded them by mail to Scheuch & Company with directions to deliver to banks holding corresponding fictitious ones and return the latter. Deliveries were made in Havre on April 26, May 3 and May 7; but because of disquieting rumors concerning wrongful practices by others the banks retained both forged and genuine documents. They had no actual knowledge of the frauds practiced upon them until May 8, when information was received

concerning the receiver's bill filed during the preceding day.

About April 20, 1910, the failure of Knight, Yancey & Company & Company, large exporting cotton merchants at Decatur, Alabama, was announced, and shortly thereafter wide publicity was given to the fact that they had made extensive use of forged through railroad bills of lading with foreign drafts. Steele, Miller & Company suspended payment April 29; bankruptcy proceedings were instituted against them May 4; removal from New Orleans of cotton covered by the above-described ocean bills was enjoined in a proceeding by the receiver filed May 7; and on August 18 the instant causes were begun.

The bill in No. 226 (typical of all) alleges—"Steele, Miller & Company, being then insolvent, with intent to prefer said Bank of Mulhouse or Scheuch & Company, or both of them, over their other creditors, did deposit in the United States mail the said port bills of lading, the said bills of lading being addressed to Scheuch & Company, and the same having been endorsed by Steele, Miller & Company, the object and purpose of forwarding said port bills of lading being to substitute the same for the forged and worthless bill or bills of lading attached to the drafts held by the said Bank of Mulhouse or Scheuch & Company, or both of them, and that said port bills of lading in due course were received by Scheuch & Company and delivered to the Bank of Mulhouse. . . . Your orator avers that the transmission of said port bills of lading to be substituted for the said fraudulent bills of lading was done with the intent to prefer the said Bank of Mulhouse, and that when the said bills of lading were mailed to the said Scheuch & Company for delivery to the Bank of Mulhouse, and were received by the said Scheuch & Company and delivered to the Bank of Mulhouse, the said Scheuch & Company and the said Bank of Mulhouse, in accepting the said bills of lading and permitting the sub-

stitution of the said valid and port or custody bills of lading for the worthless bills of lading then held, knew or should have known and had reasonable cause to believe, that a preference was thereby given and intended, and knew or should have known that Steele Miller & Company was at said time insolvent, and that the effect of the mailing, the receipt and acceptance and substitution of said bills of lading was to enable the said Scheuch & Company or the said Bank of Mulhouse to obtain payment of its said draft; and your orator now charges that the effect of the act hereinabove described, if maintained and permitted by this Honorable Court, will be to enable the said Bank of Mulhouse or Scheuch & Company, or both of them, to obtain a greater per cent. of their said debt than any other creditor of said bankrupt, and that such acts should be set aside. Your orator charges the acts hereinabove complained of were performed within four months prior to the filing of the petition of involuntary bankruptcy herein, and your orator is advised that the act or acts complained of are voidable at his election, and he does now elect to avoid the same and files this his bill to avoid said transfor." And it prays "that upon the final hearing of this bill this Court will set aside the transfer of the said 900 bales of cotton by the said bankrupt to the said Bank of Mulhouse or Scheuch & Company, or both of them, and hold the same void and of no effect, and decree that the title to the said cotton and the right of possession thereof is in your orator and will permit your orator to take possession of said cotton and administer the same, or the proceeds thereof, for the benefit of the creditors." . . .

Appellant trustee maintains that he is seeking to set aside a preference as authorized by statute; that the French banks became mere ordinary unsecured creditors of Steele, Miller & Company by paying drafts with forged bills of lading attached as security; and that when genuine bills were substituted for spurious ones these banks had

positive information of the bankrupts' insolvency and knew or should have known that they were receiving an intended preference.

In behalf of appellee banks it is insisted that the transactions between them and bankrupts were in the nature of sales and by marking and shipping the cotton before bankruptcy it was appropriated to the contracts; that bankrupts had no purpose to give a preference; and certainly the banks had no reasonable cause to believe they were receiving an intended preference.

The trial judge, relying upon "*The Idaho*," 93 U. S. 575, held the cotton was appropriated before bankruptcy to prior contracts between the parties. He further said: "I am not convinced that Steele, Miller & Company intended a preference, as it seems to me they uniformly discounted drafts purporting to be secured by bills of lading for cotton, which were in reality forged, and thereafter shipped the cotton to prevent discovery of their dishonest methods, and that their transactions with the bank were in the usual course of business and without any intention on their part other than to conceal their true methods. Furthermore, while the facts on which they might be charged with notice ought to have excited the suspicion of the bank, I am not prepared to say that they had knowledge, constructive or actual, of Steele, Miller & Company's insolvency, or that a preference was intended." The bill was accordingly dismissed and the Circuit Court of Appeals affirmed this action upon authority of *Lovell* v. *Newman & Son*, 192 Fed. Rep. 753, and *Hentz & Co.* v. *Lovell*, 192 Fed. Rep. 762.

Admitting that title to the cotton in question passed, the trustee now seeks annulment of the consummated transfer because a preference would result therefrom. In *Lovell* v. *Newman & Son*, *supra*, recovery was asked upon the theory that the title had remained in the bankrupts. By the statute's very words in order to set aside such a

transfer and recover the property it must appear that "the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference." Whether such "reasonable cause to believe" existed is a question of fact and the burden of proof is upon the trustee. *Coder* v. *Arts*, 213 U. S. 223, 240; *Wright* v. *Sampter*, 152 Fed. Rep. 196, 198; *McNaboe* v. *Columbian Mfg. Co.*, 153 Fed. Rep. 967, 968; *Tumlin* v. *Bryan*, 165 Fed. Rep. 166, 167, 168; *Reber* v. *Shulman*, 183 Fed. Rep. 564, 565; *Kimmerle* v. *Farr*, 189 Fed. Rep. 295, 299–300; *Mayes* v. *Palmer*, 208 Fed. Rep. 97, 98, 101.

Considering the whole record we are unable to conclude that appellee banks had reasonable cause to believe that by transferring the genuine bills of lading to them a preference was intended or given; and accordingly without undertaking to decide other interesting questions raised we must affirm the decree of the court below. Prior to May 8, 1910, the banks thought the forged bills in their keeping represented cotton actually moving from designated points of shipment. They were unaware of the bankrupts' crimes; and in the circumstances we cannot say they either believed or ought to have believed that they were receiving anything more than new receipts for their own property physical possession of which had passed during transit from a responsible railroad to a trustworthy steamship company.

Affirmed.

McMICKING *v.* SCHIELDS.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 285. Submitted May 12, 1915.—Decided June 1, 1915.

General Order No. 58, of April 23, 1900, amended the Philippine Code of Criminal Procedure, and gave the person charged with crime a specified time within which to plead; but even if the trial court misconstrued the provisions of the Order in that respect, such error would not deprive the proceedings of lawful effect and enlarge the accused.

Mere error of law, even though serious, committed by the trial court in a criminal case in the exercise of jurisdiction over a case properly subject to its cognizance, cannot be reviewed by *habeas corpus*.

The writ of *habeas corpus* cannot be employed as a substitute for a writ of error.

23 P. I. 526, reversed.

THE facts, which involve the validity of a conviction and sentence in the Philippine Islands and the extent to which the conviction can be reviewed on *habeas corpus*, are stated in the opinion.

Mr. S. T. Ansell for appellant:

This court has jurisdiction of this appeal.

The Supreme Court discussed and decided the cause and released the prisoner upon a misapprehension and an unwarranted assumption as to what took place in the trial court.

The record shows that appellee enjoyed all the time allowed under the Philippine practice.

The judgment of conviction was not void; it was at most only voidable for error or irregularity of procedure.

The trial court had and retained complete jurisdiction.

It had jurisdiction to decide, as a question of law arising

in the course of the trial, the question of the applicability of § 30.

Denial of time for preparation prescribed by § 30 is not a violation of the due process of law provisions of the Organic Act nor is § 30 a due process of law standard.

Non-compliance with such statutes does not violate the due process of law provisions and render the trial void.

The requirements of due process of law were fully met in the trial court.

Habeas corpus was not the proper remedy, and the Supreme Court not only abused the writ but violated its own jurisdictional power.

The proceeding complained of in the trial court being at most only erroneous or irregular *habeas corpus* was not the proper remedy.

Incomparably more serious defects than the one complained of are not remediable by *habeas corpus*.

The Supreme Court violated its own jurisdiction under Philippine law in allowing the writ.

Appellee's remedy under local law was by certiorari.

If mere procedural error is to be remedied through *habeas corpus*, as was attempted in this cause, the whole course of criminal justice in the Philippine Islands may be deranged, or even defeated.

In support of these contentions see §§ 990, 1049, Cal. Code Cr. Pr.; § 2558, Mo. R. S.; § 357, N. Y. Code Cr. Pr.; § 1, G. O. No. 58, Phil. Code Cr. Pr.; § 19, G. O. No. 58, Phil. Code Cr. Pr.; § 30, G. O. No. 58, Phil. Code Cr. Pr.; §§ 514, 528, Phil. Code Civ. Pr.; §§ 5, 9, 10, Phil. Organic Act (32 Stat. 691, 695); § 7168, Ann. Code Tenn.; §§ 4770, 4797, Comp. Laws Utah; *Re Barton*, 6 Utah, 664; *Boulter* v. *State*, 42 Pac. Rep. 606; *Brown* v. *New Jersey*, 175 U. S. 172; *State* v. *Barnes*, 3 N. Dak. 131; *Counts* v. *State*, 49 Tex. Cr. Rep. 329; *State* v. *Crinklaw*, 40 Nebraska, 759; *De La Rama* v. *De La Rama*, 201 U. S. 309; *Diaz* v. *United States*, 223 U. S. 455; *State* v. *De Wolf*,

29 Montana, 418; *Evans* v. *States*, 36 Tex. Cr. Rep. 32; *Fisher* v. *Baker*, 203 U. S. 180; *Re Frederich*, 149 U. S. 70; *Franklin* v. *South Carolina*, 218 U. S. 161, 168; *People* v. *Frederichs*, 39 Pac. Rep. 944; *Felts* v. *Murphy*, 201 U. S. 123, 129; *Gonzales* v. *Cunningham*, 164 U. S. 621; *Garland* v. *Washington*, 232 U. S. 642; *Ex parte Harding*, 120 U. S. 782; *Ex parte Haase*, 190 Pac. Rep. 946; *People* v. *Harper*, 139 App. Div. (N. Y.) 344; *State* v. *Harris*, 100 Iowa, 188; *Humphries* v. *Dist. of Columbia*, 174 U. S. 190; *State* v. *Hunter*, 171 Missouri, 435; *Hickory* v. *United States*, 151 U. S. 303; *Isaacs* v. *United States*, 159 U. S. 487; *Johnson* v. *State*, 49 S. W. Rep. (Tex.) 618; *State* v. *Jordan*, 87 Iowa, 86; *Kepner* v. *United States*, 195 U. S. 100, 122; *King* v. *State*, 56 S. W. Rep. (Tex.) 926; *State* v. *King*, 97 Iowa, 440; *Kohl* v. *Lehlback*, 160 U. S. 293; *Logan* v. *United States*, 144 U. S. 302; *Matter of Moran*, 203 U. S. 102; *Ex parte Mitchell*, 104 Missouri, 121; *In re Manning*, 139 U. S. 504; *Nokes* v. *State*, 6 Cold. (Tenn.) 297; *Partridge* v. *State*, 147 S. W. Rep. (Tex.) 234; *State* v. *Phillips*, 73 Minnesota, 77; *Case of Ratcliffe*, Foster Cr. Law, 41; *Reed* v. *State*, 31 Tex. Cr. Rep. 35; *Serra* v. *Mortiga*, 204 U. S. 470; *Stephens* v. *State*, 147 S. W. Rep. (Tex.) 235; *Templeton* v. *State*, 146 S. W. Rep. (Tex.) 933; *Taylor* v. *State*, 11 Lea (Tenn.), 712; *Valentina* v. *Mercer*, 201 U. S. 131; *Ex parte Watkins*, 3 Pet. 202; *Re Wilson*, 140 U. S. 575; *Weens* v. *United States*, 217 U. S. 367; *Woods* v. *Young*, 4 Cranch, 238; *People* v. *Winthrop*, 50 Pac. Rep. 390; *Wing* v. *United States*, 218 U. S. 272, 280.

No appearance for appellee.

Mr. Justice McReynolds delivered the opinion of the court.

The Philippine Supreme Court by final decree in a *habeas corpus* proceeding discharged appellee from custody

and the Director of Prisons has appealed. The controversy fairly involves the application of § 5, Organic Act of the Islands (Act of Congress, July 1, 1902, c. 1369, 32 Stat. 691, 692, 695); and under § 10 of that statute we have jurisdiction of the appeal. *Fisher* v. *Baker*, 203 U. S. 174; *Paraiso* v. *United States*, 207 U. S. 368.

Appellee, Schields, presented a petition to the Supreme Court January 4, 1911, wherein, after setting out his alleged wrongful imprisonment under a judgment entered in the Court of First Instance, City of Manila, he further alleged and prayed: "That said imprisonment and deprivation of his liberty are illegal, because the said Court of First Instance denied him the due process of law guaranteed by the Philippine Bill of Rights. The said illegalities are as follows: That on December 21, 1910, the petitioner appealed from a judgment of the lower court sentencing him for the crime of theft. That on December 23, the petitioner, without having been asked to answer the complaint, was notified that the case would be heard at 10 a. m. on December 24. When the case was called at 10 a. m. on December 24, and while the petitioner was arraigned, he asked for time in which to answer the complaint, which request was denied by the court, who ordered the Clerk to enter on the record that the petitioner pleaded 'Not Guilty' to the complaint. Thereupon the petitioner's attorney also asked for time in which to prepare a defense, which petition was also denied by the same court, to which ruling the petitioner's attorney excepted and asked that the exception, together with the requests of the petitioner which had been denied, be entered on the record. Wherefore, the petitioner prays the Honorable Supreme Court to issue a Writ of Habeas Corpus in his favor, reversing the judgment pronounced by the lower court as being contrary to law, and that the petitioner be set at liberty."

Responding to a rule to show cause why the writ should

not issue, appellant answered that by virtue of an order of the Court of First Instance petitioner was in his custody in Bilibid Prison to serve a sentence of four months and one day of *arresto mayor* imposed upon conviction of theft. Copies of the commitment and judgment were made parts of the return. In course of that judgment the judge said: "At the beginning of the trial the defendant asked for further time to prepare, and invoked certain sections of G. O. 58, which, in our judgment, were not applicable to this case. The prosecution did not file a new complaint in this court. Defendant was tried on the identical complaint which was presented in the court below as long ago as December first. To that complaint, as the record shows, he pleaded not guilty and having further brought this case here on appeal the presumption is that such plea continued and to allow delays for the reiteration of such a plea would be an empty formality. The law does not require a vain and useless thing and the provision in question must be construed as applying to cases where a new complaint is filed in this court. But aside from this we think that the time of trial caused no prejudice to the accused. As we have seen, the complaint was filed on December first, and the accused had more than three weeks to prepare before the trial in this court. During this period there were evidently one or more continuances and finally it seems the defendant had to be called into the Municipal Court by a bench warrant. Upon bringing the case here it was incumbent upon him to follow it up and to be ready and waiting its disposition by this court. Notice of the trial was sent both to him and to his counsel the day before and it was not claimed that defendant could have produced any further testimony if the case had been postponed. On the contrary, it appears that he called one witness who did not testify in the court below. After all the question in the case is mainly one of law. The principal controversy as to the

facts relates to the question of the alleged permission to take the articles, and this, as we have seen would not have excused the defendant, even had it been proved, though he admits that himself and Frandon are the only witnesses on that point."

General Order No. 58, promulgated from the Office of the United States Military Governor April 23, 1900, and now in effect, amended the Code of Criminal Procedure theretofore in force within the Islands. *Kepner* v. *United States*, 195 U. S. 100, 111. It provides: "Sec. 19. If, on the arraignment, the defendant requires it, he must be allowed a reasonable time, not less than one day, to answer the complaint or information. He may, in his answer to the arraignment, demur or plead to the complaint or information. . . . Sec. 30. After his plea the defendant shall be entitled, on demand, to at least two days in which to prepare for trial."

Section 528 of the Code of Civil Procedure enacted by the Philippine Commission August 7, 1901, provides: "If it appears that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of a judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed; or if the jurisdiction appear after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order."

The pertinent part of § 5 of the Organic Act, approved July 1, 1902—"The Philippine Bill of Rights"—is as follows: "That no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws. That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of

the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf." . . . *Kepner* v. *United States, supra,* 117, 118.

The Supreme Court having heard the cause upon petition and reply held—one judge dissenting—that the writ of *habeas corpus* should be allowed and discharged the prisoner. Among other things it declared: "The denial to the accused of the time, at least two days, to prepare for trial, expressly given to him by mandatory statute, there being absolutely no discretion lodged in the court concerning the matter, is in effect the deprivation of the constitutional right of due process of law, to a trial before condemnation, said statute being for the purpose of making practically effective in benefit of the accused said constitutional provision. . . . The denial to the accused of a constitutional right does one of two things, it either ousts the court of jurisdiction to enter a judgment of conviction, or it deprives the record of all legal virtue, and a judgment of conviction entered thereon is a nullity, it having nothing to support it. . . . He applied for a writ of habeas corpus upon the ground that the judgment was void as a matter of law as he had been convicted without due process of law. . . . The refusal of the time in which to prepare for trial and the consequent forcing of the defendant to his defense on the instant is, under the provisions of our law, equivalent, in our judgment, to the refusal of a legal hearing. It amounts in effect to a denial of a trial. It is an abrogation of that due process of law which is the country's embodied procedure, without which a defendant has, in law, no trial at all. . . . Nobody has denied the initial jurisdiction of the trial court. It has never been discussed or even questioned in this court. That jurisdiction has always been freely conceded. The decision of this court rested upon something which

occurred after the jurisdiction referred to had attached and after the trial had begun. It rested upon the proposition that, while the trial court had jurisdiction in the first place, it either lost that jurisdiction during the progress of the trial, or so transcended its powers as to render its judgment void." . . .

We are unable to agree with the conclusion of the Supreme Court that the judgment pronounced by the Court of First Instance was void and without effect. Under the circumstances disclosed denial of the request for time to answer and to prepare defense was at most matter of error which did not vitiate the entire proceedings. The cause—admitted to be within the jurisdiction of the court—stood for trial on appeal. The accused had known for weeks the nature of the charge against him. He had notice of the hearing, was present in person and represented by counsel, testified in his own behalf, introduced other evidence, and seems to have received an impartial hearing. There is nothing to show that he needed further time for any proper purpose, and there is no allegation that he desired to offer additional evidence or suffered substantial injury by being forced into trial. But for the sections in respect of procedure quoted from General Order No. 58 it could not plausibly be contended that the conviction was without due process of law. The Court of First Instance placed no purely fanciful or arbitrary construction upon these sections and certainly they are not so peculiarly inviolable that a mere misunderstanding of their meaning or harmless departure from their exact terms would suffice to deprive the proceedings of lawful effect and enlarge the accused. *Ex parte Harding*, 120 U. S. 782, 784; *In re Wilson*, 140 U. S. 575, 585; *Felts* v. *Murphy*, 201 U. S. 123, 129; *Matter of Moran*, 203 U. S. 96, 104, 105; *Frank* v. *Mangum*, 237 U. S. 309.

"Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdic-

tion over a case properly subject to its cognizance, cannot be reviewed by *habeas corpus*. That writ cannot be employed as a substitute for the writ of error." *Ex parte Parks*, 93 U. S. 18, 21; *Ex parte Siebold*, 100 U. S. 371, 375; *Ex parte Royall*, 117 U. S. 241, 250; *In re Frederich, Pet'r*, 149 U. S. 70, 75; *Baker* v. *Grice*, 169 U. S. 284, 290; *Tinsley* v. *Anderson*, 171 U. S. 101, 105; *Markuson* v. *Boucher*, 175 U. S. 184; *Henry* v. *Henkel*, 235 U. S. 219, 229; *Frank* v. *Mangum*, *supra*.

The decree of the Supreme Court of the Philippine Islands granting the writ of *habeas corpus* and discharging the prisoner must be reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

HERRMANN *v.* EDWARDS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 222. Argued April 14, 1915.—Decided June 14, 1915.

The rule that, in the absence of diversity of citizenship, jurisdiction of the District Court over a suit depends upon whether there is a Federal cause of action stated in the bill applies to suits against national banks and their directors.

Under the act of August 13, 1888, the Federal courts have not, in the absence of diverse citizenship, jurisdiction of a suit by a stockholder against directors of a national bank and the bank to compel the directors to reimburse the bank for wrongfully investing its funds, nor has the District Court any jurisdiction of such a suit under paragraph 16 of § 24, Judicial Code.

The intention of Congress to make such a radical change in the rule

prevailing for many years as to confer jurisdiction on the Federal courts of all suits by and against national banks will not be presumed in the absence of clear manifestation of such purpose.

THE facts, which involve the jurisdiction of the District Court of a suit against a national bank and its directors, under the Act of August 13, 1888, and paragraph 16, § 24 of the Judicial Code, are stated in the opinion.

Mr. Shepard Barclay, Mr. S. Mayner Wallace and *Mr. Wm. R. Orthwein* for appellant, submitted:

It was error to dismiss the bill for supposed want of Federal jurisdiction as the powers of the banks under Federal laws were directly involved.

Where any ingredient of the case is Federal, that jurisdiction is applicable.

The principles of other decisions disclose jurisdiction over the case in this bill.

The refusal of leave to amend was also error.

The suit arises under the laws of the United States.

In support of these contentions, see *Abbott* v. *Bank*, 175 U. S. 409; *American Nat. Bank* v. *Tappen*, 174 Fed. Rep. 431; *Bailey* v. *Mosher*, 63 Fed. Rep. 488; *Bank* v. *Wade*, 84 Fed. Rep. 10; *Chicago Railway* v. *King*, 222 U. S. 222; *Citizens' National Bank* v. *Appleton*, 216 U. S. 196; *Cockrill* v. *Abeles*, 86 Fed. Rep. 505; *Cohens* v. *Virginia*, 6 Wheat. 379; *Cooke* v. *Avery*, 147 U. S. 375; *Cooper* v. *Hill*, 94 Fed. Rep. 582; *First Nat. Bank* v. *Converse*, 200 U. S. 425; *First Nat. Bank* v. *Hawkins*, 174 U. S. 364; *First Nat. Bank* v. *Nat. Exch. Bank*, 92 U. S. 122; *Huff* v. *Bank*, 173 Fed. Rep. 335; *International Trust Co.* v. *Weeks*, 203 U. S. 364; *Larabee* v. *Dolley*, 175 Fed. Rep. 365; *Lesser* v. *Gray*, 236 U. S. 70; *Louis. & Nash. R. R.* v. *Finn*, 235 U. S. 601; *Louis. & Nash. R. R.* v. *Mottley*, 211 U. S. 149; *Merchants' Bank* v. *Wehrmann*, 202 U. S. 295; *Milkman* v. *Arthe*, 213 Fed. Rep. 642; *Os-*

born v. *Bank of United States*, 9 Wheat. 822; *Pacific Railroad Removal Cases*, 115 U. S. 12; *Petri* v. *Commercial National Bank*, 142 U. S. 644; Rev. Stat.,§§ 5136, 5151, 5220; 4 Fed. Stats. Ann., p. 248; *Tennessee* v. *Davis*, 100 U. S. 257; *Tex. & Pac. Ry.* v. *Howell*, 224 U. S. 577; *Whittemore* v. *Bank*, 134 U. S. 527; *Wyman* v. *Wallace*, 201 U. S. 230.

Mr. C. D. Corum, with whom *Mr. Sam B. Jefferies*, *Mr. Daniel N. Kirby*, *Mr. Eugene S. Wilson*, *Mr. Joseph W. Lewis*, *Mr. Charles M. Rice*, *Mr. John F. Lee* and *Mr. Charles M. Polk* were on the brief, for appellees:

Prior to 1882, the District Court had jurisdiction of all cases by or against national banks, see Act of June 3, 1864, c. 106, § 57; *Petri* v. *Commercial Natl. Bank*, 142 U. S. 644, 649; *Ex parte Jones*, 164 U. S. 691, 692.

After the Act of 1882, the District Court only had jurisdiction of actions by or against national banks where it would have had jurisdiction of actions by or against citizens of the respective States. *Leather Mfrs. Bank* v. *Cooper*, 120 U. S. 778, 781; *Petri* v. *Commercial Natl. Bank*, 142 U. S. 644, 649; *Ex parte Jones*, 164 U. S. 691, 692; *In re Chetwood*, 165 U. S. 443, 459; *Continental Natl. Bank* v. *Buford*, 191 U. S. 119, 123.

The District Court has no jurisdiction in a suit against the directors of national banks for acts alleged to have been in fraud and in violation of the National Bank Acts, where there is not a substantial and meritorious controversy as to the construction or effect of some provision of the National Bank Act. *Whittemore* v. *Amoskeag Bank*, 134 U. S. 527, 529.

There has been no change in the law affecting the jurisdiction of District Courts in suits by or against national banks since the Act of 1882. Acts of July 12, 1882, § 4; August 13, 1888, § 4; March 3, 1911, § 24, p. 16.

In order that the District Court may have jurisdiction

in a case involving a construction of the National Bank Act, the bill must show that there was an actual meritorious dispute, and that the result of the suit depended upon the construction of the act. *Gold Washing Co.* v. *Keys*, 96 U. S. 189, 203; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 190; *Hull* v. *Burr*, 234 U. S. 712, 720; *Shultis* v. *McDougal*, 225 U. S. 561, 569; *Water Co.* v. *Newburyport*, 193 U. S. 561; *Arbuckle* v. *Blackburn*, 191 U. S. 405; *West. Un. Tel. Co.* v. *Ann Arbor R. R.*, 178 U. S. 239; *McCain* v. *Des Moines*, 174 U. S. 168; *New Orleans* v. *Benjamin*, 153 U. S. 411; *Tennessee* v. *Bank*, 152 U. S. 454; *Shreveport* v. *Cole*, 129 U. S. 36; *Carson* v. *Dunham*, 121 U. S. 421; *Germania Ins. Co.* v. *Wisconsin*, 119 U. S. 473; *Stern* v. *New York*, 115 U. S. 248; *Hartnell* v. *Tilghman*, 99 U. S. 547.

It is *ultra vires* for national banks to purchase for investment stocks of other national banks. *First Natl. Bank* v. *Natl. Exchange Bank*, 92 U. S. 122, 128; *California Natl. Bank* v. *Kennedy*, 167 U. S. 362; *First Natl. Bank* v. *Hawkins*, 174 U. S. 364; *Shaw* v. *German-American Bank*, 199 U. S. 603; *First Natl. Bank* v. *Converse*, 200 U. S. 425.

No Federal question is disclosed in either the original or the amended bill. See cases *supra.*

In support of these contentions see also *Austin* v. *Gagen*, 39 Fed. Rep. 626; *Catholic Mission* v. *Missoula County*, 200 U. S. 126; *Crews* v. *Barden*, 36 Fed. Rep. 617; *California Natl. Bank* v. *Kennedy*, 167 U. S. 362; *Devine* v. *Los Angeles*, 202 U. S. 13; *Dimpfel* v. *Railroad*, 110 U. S. 29; *Detroit* v. *Dean*, 106 U. S. 537; Foster's Federal Practice, Vol. 1, p. 59; *Hawes* v. *Contra Costa Water Co.*, 104 U. S. 450; *Kansas* v. *Bradley*, 26 Fed. Rep. 289; *Logan County Bank* v. *Townsend*, 139 U. S. 67; *Myrtle* v. *Railroad*, 177 Fed. Rep. 193; *Montana Ore Co.* v. *Barton Copper Co.*, 85 Fed. Rep. 367; *Nelson* v. *Railway Co.*, 172 Fed. Rep. 478; *Peabody Mining Co.* v. *Gold Mining Co.*, 97 Fed. Rep. 657; *Railroad Co.* v. *Steele*, 167 U. S. 659; *Terkauf* v. *Ireland*, 27 Fed. Rep. 769; *Taylor* v. *Holmes*, 127 U. S. 489.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

If the statutes which control the question for decision in this case and their significance as settled by the decisions of this court long prior to the commencement of this suit be at once stated, it will serve to clarify and facilitate the analysis of the issue to be decided. Section 4 of the act of Congress of August 13, 1888, c. 866, 25 Stat. 433, provided as follows (p. 436):

"That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; ~~and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State~~. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." (A line is drawn through certain words for reasons hereafter referred to.)

This section was but a reënactment of an identical provision contained in § 4 of the act of Congress of March 3, 1888 (c. 373, 24 Stat. 552, 554) and again this was but the reënactment of an identical provision contained in § 4 of the act of July 12, 1882 (c. 290, 22 Stat. 162, 163).

Under the provisions of the Act of 1882 long prior to their reënactment in 1888 it had been conclusively established that because a corporation was a national bank created under an act of Congress gave it no greater right to remove a case than if it had been organized under a state law. *Leather Manufacturers' Bank* v. *Cooper*, 120 U. S. 778. And after the reënactment in 1888 a case

(*Whittemore* v. *Amoskeag National Bank*, 134 U. S. 527) was decided involving a controversy controlled by the Act of 1882 but the decision of which was necessarily also an interpretation of the Act of 1888, as the two were identical. The case was this: A stockholder of a national bank on his own behalf and of all others who might join, sued in a Circuit Court of the United States, the directors of the bank, making the bank also a party defendant, to hold the directors liable for an act of alleged maladministration committed by them. The prayer was that the directors be decreed to pay back to the bank for the benefit of its stockholders the amount of money lost by the bank as the result of their misconduct. There was no diversity of citizenship upon which the jurisdiction of the Circuit Court could rest and therefore its power to entertain the case rested alone upon the fact that the defendant bank was a national banking association, that the other defendants were directors of such an association and that the liability sought to be enforced arose from misconduct on their part in relation to their duties to the bank. The Circuit Court, not passing upon these questions, dismissed the bill because there had not been a compliance with Equity Rule 94. But this court concluding that the Act of 1882 excluded jurisdiction as a Federal court, the action of the court below in dismissing for want of compliance with the Equity Rule was reversed and the case remanded with directions to dismiss for want of jurisdiction as a Federal court. Of course this conclusion involved deciding that in the absence of a Federal controversy concerning the interpretation of some provision of the National Bank Act raising what might be considered by analogy a Federal question in the sense of § 709, Rev. Stat., a mere assertion of liability on the part of directors for wrongs for which they might be responsible at common law, afforded no basis for jurisdiction. Indeed, that this conception was the one upon which the decision was

rested is shown by the fact that in the course of the opinion it was pointed out that neither the provisions of § 5209, Rev. Stat., providing for criminal punishment of directors of national banks in certain cases, nor § 5239, Rev. Stat., giving certain powers to the Comptroller of the Currency in certain instances, were involved in the cause of action so as to give rise to a Federal question upon which the jurisdiction could be based.

This ruling during the many years which have elapsed has never been questioned and the fundamental principle upon which it rested has been applied in various aspects. *Petri* v. *Commercial Bank*, 142 U. S. 644; *Ex parte Jones*, 164 U. S. 691, 693; *Continental National Bank* v. *Buford*, 191 U. S. 119; *Yates* v. *Jones National Bank*, 206 U. S. 158; *Thomas* v. *Taylor*, 224 U. S. 73.

By § 24 of the Judicial Code of 1911 the jurisdiction of the district courts is provided for. The sixteenth paragraph of that section gives those courts original jurisdiction as follows:

"Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all National banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located."

The statutory law with the concluded interpretation affixed to it to which we have referred being in force, this suit was commenced in the court below in March, 1913.

The complainant, as a stockholder in the National Bank of Commerce, a national banking association established and carrying on business in St. Louis, Missouri, on his own and on behalf of all other stockholders who might elect to join in the suit, sought recovery from the defendants, George Lane Edwards and Benjamin F. Edwards, of an amount exceeding $1,300,000 for the benefit of the complainant and the other stockholders of the National Bank of Commerce upon substantially the following grounds: That the defendants as directors and officers of the National Bank of Commerce, having also a large interest, direct or indirect, in another national bank known as the Fourth National Bank, had devised a scheme by which the National Bank of Commerce would buy out the Fourth National Bank for a sum utterly disproportionate to the value of the property and rights to be transferred, thus despoiling the National Bank of Commerce and its stockholders and wrongfully enriching the Fourth National Bank and its stockholders to the extent of the inordinate price which was paid. It was charged that this scheme of fraud and wrong was a breach of trust on the part of the two main defendants, and was accomplished by them by a wrongful and fraudulent exercise and perversion of the power possessed by them over the business of the National Bank of Commerce. It was alleged that demand had been made upon the directors and officers of the National Bank of Commerce to sue the main defendants for a recovery of the amount by which they had wrongfully enriched themselves to the detriment and injury of the National Bank of Commerce and its stockholders, but they had refused to do so and the directors of the bank were joined as defendants. The prayer was for an accounting, for a fixing of the amount by which the National Bank of Commerce had been despoiled and for a decree against the defendants to pay the sum so fixed for the benefit of the stockholders of the National Bank of Commerce. There

was no diversity of citizenship and jurisdiction over the suit therefore depended upon whether there was a Federal cause of action stated upon which the authority of the court to entertain the cause could be based.

Except in so far as it may be conceived that a Federal cause of action giving jurisdiction existed because of the averment that the National Bank of Commerce was a United States corporation and the reiterated charges of wrongdoing and breach of trust by the two main defendants there was nothing in the bill from which it could be considered that a Federal right adequate to give jurisdiction was asserted unless it be a passage from the bill which we quote:

"The acts and transactions of said defendants Benjamin F. Edwards and George Lane Edwards in the matter of the transfer of the assets and property of the Fourth National Bank to the National Bank of Commerce were contrary to the laws of the United States and beyond the powers, under the acts of Congress in such case made and provided, of the National Bank of Commerce as an incorporated banking association under the laws of the United States, and that the acts and doings of the said Benjamin F. Edwards and George Lane Edwards in promoting, effecting and executing the transfer of the assets, and property of the Fourth National Bank, aforesaid, to the National Bank of Commerce were in violation of the National Banking laws of the laws governing said banking institutions, and were furthermore a breach of trust on the part of said Benjamin F. Edwards and George Lane Edwards as directors of the Bank of Commerce, and the facts and circumstances of their interest in the Fourth National Bank as stockholders and otherwise render their action as directors in the National Bank of Commerce in St. Louis in promoting, effecting, and executing the transfer of the assets and property of the Fourth National Bank to the National Bank of Commerce, a breach of

trust, in that said defendants, Benjamin F. Edwards and George Lane Edwards, as directors of the National Bank of Commerce in St. Louis, were in duty bound to execute the trust which said office provided, in such a manner as not to promote their own pecuniary and personal interest; and therefore their acts as aforesaid, were in violation of the National Banking laws of the United States as well as contrary to equity and good conscience, and for the consequences and damages resulting therefrom said Benjamin F. Edwards and George Lane Edwards were and are liable to the National Bank of Commerce for all damages ensuing on account thereof."

There were demurrers for want of jurisdiction which were maintained and the bill was dismissed and the case is here on a direct appeal upon the theory that the power of the court as a Federal court to entertain the cause is involved and that that single question is to be determined.

It is apparent that the general statements made in the bill to the effect that Federal considerations were essential to the determination of the cause of action were but conclusions of law affording no jurisdiction apart from the right to entertain the cause which would arise from the substantive and essential facts upon which the bill was based. Indeed when the averments of the bill are analyzed there is no escape from the conclusion that the jurisdiction to entertain it could not have been exerted without disregarding the plain letter of the statute in force since 1882. In fact this inevitable result does not depend upon the mere text of the statutes referred to since there is an absolute legal identity between this and the *Whittemore Case* and that case hence forecloses every contention here relied upon.

But it is said that conceding these conclusions inevitably result from the statute law as it existed prior to the Judicial Code, the Judicial Code has made a radical change in the law which now requires a different interpretation.

But we think the contention on the face of the statute is without foundation and that a brief consideration of the text of the Act of 1888 and of par. 16 of § 24 of the Judicial Code will make this clear.

The proposition rests upon the omission from the Judicial Code of the certain words in the Act of 1888 through which in the quotation which we have previously made a line has been passed. But when par. 16 of § 24 of the Judicial Code and § 4 of the Act of 1888 are considered together, the omission of the words referred to serves at once to destroy the proposition here relied upon for these reasons: Section 4 of the Act of 1888, as will be seen, opened with the provisions which excluded national banks from the Federal jurisdiction which otherwise would have attached to controversies concerning them. This being done, the statute proceeded to provide that the exclusion previously specified should not include certain classes of controversies which it was deemed best should come under the Federal jurisdiction, thus leaving those classes of cases under the general rule, since they were carved out by the last clause of the section from the provisions as to exclusion which were found in the first. In reënacting these provisions of the Act of 1888 in par. 16 of § 24 of the Judicial Code, obviously to make the purpose of the reënacted statute clearer, just the opposite form of statement was resorted to, since paragraph 16 opens by conferring Federal jurisdiction only in those classes of cases which were kept within that jurisdiction by the concluding clause of § 4 of the Act of 1888, and hence no jurisdiction was given as to the other classes of cases which were excluded from such jurisdiction by the Act of 1888. The reënacted section in other words, instead of generally stating what was excluded from jurisdiction and then carving out exceptions, as was done in the Act of 1888, gave jurisdiction only in the cases where it was intended to give it and then proceeded to declare that in all other cases within the

contemplation of the section there should be no jurisdiction, thus making the lines clear and broad and leaving no room for controversy or doubt. Aside from this it is to be moreover observed that the intention of Congress to make by the adoption of the Judicial Code so radical a change from the rule which had prevailed for so long a period is not to be indulged in without a clear manifestation of such purpose. Besides, as there is no ground for distinguishing between the restrictions as to jurisdiction imposed by par. 16 of § 24, it must follow that the argument now made based upon the omission of the words which were found in the Act of 1888 would apply to all of paragraph 16 and therefore none of the restrictions as to jurisdiction in that paragraph would be operative. Thus in both aspects the contention must come to this: that on the one hand because the provisions of paragraph 16 are comprehensively all-embracing, they must be held to be restrictive and on the other hand, that because the provisions of the Act of 1888 were reënacted, they were repealed.

As it follows that the court below was right in dismissing the bill for want of jurisdiction as a Federal court to consider it, its decree is therefore

Affirmed.

KAPIOLANI ESTATE, LIMITED, *v.* ATCHERLEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 174. Argued April 30, 1915.—Decided June 14, 1915.

A decree was made in 1855, by the Hawaiian court having jurisdiction, to the effect that one who was guardian of a minor had wrongfully obtained from the Land Commission registration in his own name of property belonging to the minor, and that he, and his heirs claiming the property after his decease, held the property as trustee for the ward, and should convey the same to him; the decree was acquiesced in so far as possession was concerned, but no deed was ever executed, and subsequently those holding under the heirs of the guardian having commenced an ejectment suit relying on the legal title, the grantee of the ward brought this suit to enjoin prosecution of the ejectment suit; meanwhile in a suit between a grantee of the ward and others claiming under the heirs of the guardian, it was held that a title registered by the Land Commission could not be attacked; the record in that suit, however, did not disclose the relations of the guardian and the ward; this court having affirmed that judgment, the Hawaiian courts in this case, while admitting that they had fallen into error in the former decision by reason of not giving full effect to the guardianship relations, followed it because it had been affirmed by this court. *Held* that:

In *Lewers & Cooke* v. *Atcherley*, 222 U. S. 285, the suggestion that the relation of guardian and ward existed had no substantial foundation on the record, and this court followed the decision of the local court; the relationship of guardian and ward having now been cleared up and the record in this case showing that it did exist, the courts of Hawaii should have given full effect to that fact, notwithstanding the affirmance by this court of the prior and contrary decision of the Hawaiian court when it did not appear, and so the judgment is reversed and the case sent back to the Hawaiian court.

Under the law of the Hawaiian Islands as far back as 1846, a guardian could not, through the instrumentality of an award of the Land Commission, obtain a title to the property of his ward which

would be so immune from subsequent attack that the wrong would be without redress.

There is nothing to hinder a court from changing its action on a different view of law, after an interlocutory decree or to hinder a party to the action from availing itself of such change unless the decision has the finality of *res judicata.*

A corporation, grantee of a portion of the grantor's property, is not a privy to a grantee of another portion, and a judgment against the latter in a suit in which the corporation was not a party, although some of its officers as individuals had notice thereof and took some part in the defense, is not *res judicata* if the acts of such officers were, as in this case, merely individual and not authorized by the corporation.

In order to make a judgment against the grantor available to the grantee of the title his covenantor must receive notice of the suit and have an opportunity to defend.

21 Hawaii, 441, reversed.

THE facts, which involve the title to land in Hawaii, are stated in the opinion.

Mr. David L. Withington, with whom *Mr. William R. Castle, Mr. W. A. Greenwell* and *Mr. Alfred L. Castle* were on the brief, for appellant:

The judgment of 1858 was right and should be enforced. "A minor on coming of age can obtain relief in equity against a guardian who in fraud of his ward, presents a claim and obtains in his own name an award of title to the minor's land."

The exact point was raised and decided in the equity action in 1858, it was necessarily involved in the probate proceeding in that year, the decision of the Supreme Court of Hawaii on demurrer in 1903 declined to review it, and it is sustained by the present decision.

The equity suit before Chief Justice Allen did not seek to set aside the land commission award, but to obtain its fruits. The jurisdiction had been expressly granted to the Supreme Court by statute before 1858.

The court, before 1858, had declared its jurisdiction in plain terms, and has since consistently maintained such construction of its jurisdiction.

This is in accord with the decisions of this court.

The acts in regard to Mexican land grants in California provided for a decree and patent of similar conclusive effect to a land commission award in Hawaii, and this court has repeatedly held that trust relations are not affected.

The decree in 1858 is based on the ownership of the property by Kalakaua, a minor; that Kinimaka was his guardian, owing him the duty to present the land for award to the land commission; the presentation and obtaining the award to himself; the minor's coming of age, and the obligation of the guardian to account. In other words, it was an equitable action by a minor against his guardian for an accounting upon coming of age.

Kalakaua was the undoubted owner of the property.

Kinimaka was the guardian of Kalakaua and as such had absolute control and management of the ward's property, with the power of disposition.

It was his duty to present the land to the Land Commission for award and his failure to do so forfeited Kalakaua's right.

A guardian is not allowed to set up title against his ward.

The guardian is under an equitable obligation to account.

The ward, in the accounting, can elect to take the property.

The right of the ward is a contractual or *quasi*-contractual right against the guardian, which rights are not affected by a land commission award.

This court should reverse the judgment in accordance with familiar rules of equity and should follow the law of the case decided by the Supreme Court of Hawaii when it was the court of last resort.

This is a matter of local law and custom, in which this court should follow the local courts, which have in this action three times ruled the law with appellant.

The court of the time when these local laws and customs were in force twice so decided between litigants, to whom the parties in this action are privies.

This court should not interfere with the exercise of discretion by the Supreme Court of Hawaii in refusing to open up the decree of 1858 in aid of a speculator, claiming title under a breach of trust by a wrongdoer, where this would result in mischief to innocent parties and is not essential to the equities of the case.

The minor never had his day in court until the actions in 1858.

The Hawaiian court erred in holding that the decision of this court in the *Lewers & Cooke Case* was binding although erroneous. But, if binding, it should be overruled.

Numerous authorities of this and other courts are cited in support of these contentions.

Mr. Lyle A. Dickey, with whom *Mr. E. M. Satson* and *Mrs. Mary H. Atcherly* were on the brief, *pro se:*

The Supreme Court of Hawaii did not err in holding that it must follow a United States Supreme Court decision, though that decision upholds a decision of the lower court on a matter of local law.

There are no facts in this case which give appellant a greater equity than was possessed by its grantee in the former case.

The argument that guardianship was claimed and proved in the ancient equity case and that the resultant fiduciary relationship between Kinimaka and Kalakaua gave a court of equity in 1858 authority to re-investigate the question as to what person had a right to the award and to order the guardian of the holders of the allodial title created by the award to convey it to Kalakaua was

presented both to the Supreme Court of Hawaii and this court in the *Lewers & Cooke Case.*

The rule of the "law of the case" is not involved here.

The court below was also right in following the *Lewers & Cooke Case* because of the peculiar relation of appellant to that case which makes that case binding on appellant because of appellant's laches, present lack of interest in the case and *res judicata.*

The status of the *Lewers & Cooke Case* is that of a prior case because judgment was first reached in it.

Appellant is barred by laches from any standing in equity, and having sold all equitable title in the land to Lewers & Cooke, has no equitable interest in the subject-matter to sustain this suit.

The Lewers & Cooke decree should be followed in this case because it is *res judicata.*

The original tenure of Hawaii from the time Kamehameha first established the monarchy to 1839 was feudal and a despotism. The king and each overlord under him had absolute ownership and control of the land and people under him.

The constitution of 1839 and laws down to establishment of the Board of Commissioners to Quiet Land Titles in 1845 gave protection to interests in land, but those interests were still feudal, largely undefined, and the remedy for wrongful dispossession of an heir was payment of damages, not return of the land.

The awards of the Board of Commissioners to Quiet Land Titles created fee simple titles for the first time; did away with feudal tenure and settled forever all claims to land arising prior to December 10, 1845.

In the case of 1858 no fraud, actual or constructive, was pleaded or proved.

The entire record negatives either actual fraud by Kinimaka or any constructive fraud arising out of fiduciary relations.

Equity had no jurisdiction because Kalakaua had an adequate remedy at law.

Moses Kapaakea Kinimaka was not a party to the equity case of 1858 and no estoppel of record results from it against appellees.

The case of *Kalakaua* v. *Kinimaka* is a distinct case from that of *Kalakaua* v. *Pai and Armstrong, guardian*, so no claim can rightly be made that the minors were before the court as privies of Kinimaka.

Numerous authorities of this and other courts are cited in support of these contentions.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal to review a decree of the Supreme Court of Hawaii which reversed a decree of the circuit judge of the first judicial circuit enjoining the prosecution of an action of ejectment brought by Mary H. Atcherley, one of the appellees, against appellant for the recovery of certain described lands, decreeing that appellant had the equitable title to the lands and that appellees, including Dickey and Watson, who were made parties pending the suit, held the naked legal title thereto as tenants in common, one-half thereof by Mary H. Atcherley and one-quarter thereof by each of the other appellees, as trustees of appellant. The decree required that the appellees execute a conveyance of such title to appellant.

The bill alleges that one David Kalakaua, under and through whom the appellant company (designated hereinafter as complainant) claims, on or about December 29, 1856, litigated his title with the following parties, under whom defendant Atcherley claims title, to-wit: Kinimaka, Pai, his wife, and their children, in the Supreme Court of the Hawaiian Islands, in equity, alleging that Kinimaka held title to the lands in trust and as guardian

of Kalakaua and not otherwise, and praying that he, Kinimaka, be declared trustee of the lands for Kalakaua and be decreed to convey the same in fee to Kalakaua; that summons was duly issued and served on Kinimaka, who, before filing answer died, leaving a will devising the lands to his children, whom he left surviving him, and his widow, Pai; that these facts were suggested to the court and it was prayed that the widow and children be made parties to the suit, and a guardian *ad litem* be appointed for the children, it being alleged that they became trustees of the property in the same manner and under the same trust as Kinimaka.

That subsequently (March 8, 1858) Kalakaua filed a petition for administration upon the estate of one Kaniu, deceased, under whom he claimed title to the lands, and for the appointment of a guardian *ad litem* for the minor children of Kinimaka. That upon the filing of such petition George E. Beckwith, administrator of the estate of Kinimaka, was appointed guardian *ad litem* of the minor children of Kinimaka, and notice was served on him as such administrator and guardian and upon Pai to show cause why letters of administration might not issue to Kalakaua upon the estate of Kaniu, deceased.

That upon proceedings being had a decree was rendered adjudging Kalakaua to be the devisee of Kaniu and directing letters to be issued to him.

That on June 19, 1858, Kalakaua filed a further petition alleging the same facts substantially which he had alleged in the petitions of December 29, 1856, and March 16, 1857, with the additional fact that one Richard Armstrong had been appointed guardian of the minor children of Kinimaka, and prayed that he might be ordered to convey the lands to Kalakaua; and that a summons was duly served upon Armstrong as guardian of the children and upon Pai; that Armstrong and Pai subsequently answered; that evidence was taken, the case heard upon

the merits, and on November 2, 1858, the court duly entered the following decree:

"David Kalakaua against Richard Armstrong, guardian of Kaniu, David Leleo, and Kinimaka, minor children of Kinimaka, deceased. The court did order, adjudge and decree in this matter that Mr. Armstrong, as guardian of Kaniu, David Leleo, and Kinimaka, minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this cause, the land named Omulimalo, on the island of Molokai, and the first Apana of land set forth in Royal Patent 1602 filed in this cause."

That it did not appear either from the records of the court or from the registry of deeds in Honolulu that the decree of the court was in fact obeyed but, it is alleged, that after the decree Kalakaua "ceased to be molested in any way by either the widow and heirs aforesaid of said Kinimaka, or by the said Armstrong in their behalf, and retained open, notorious and undisputed possession and dealt with the said land in all ways as his own, and continued to do so until he disposed of said property."

The bill here made "all papers, pleadings and exhibits of whatsoever kind in said equity proceedings" a part of it and asked leave to refer to them as if actually incorporated therein. Then came the following: "And, in this connection, the complainant attaches hereto a copy of the original Land Commission award and royal patent [they were not previously referred to in the bill], and copies of the original record of evidence given before the Land Commission in support of said Land Commission award and royal patent, the same being referred to and made a part of the evidence in said equity proceedings instituted in the years 1856 and 1857 above referred to, which said copies are made a part of this bill."

That the successors in title of Kalakaua (the conveyances being set out) had retained and had been in the same kind of possession and exercised the same disposition

as he. That such possession in Kalakaua and his successors was known to the children of Kinimaka; that they attained their majority respectively in 1867, 1871 and 1877 and at no time did they or any of them assert any claim to the land or deny the rights of Kalakaua or his successors but acquiesced in his and their possession.

The manner by which defendants obtained the title they assert was set out and it was alleged that owing to the failure of Armstrong to obey the decree of the court and convey the interest of the children of Kinimaka as ordered by the court, complainant's required chain of title was incomplete and that the action in ejectment of Mary H. Atcherley, one of the defendants, sought "to take unconscionable advantage of the above-mentioned technical error in the chain of title." A cloud upon the title of complainant was asserted hence to follow and that it would be inequitable to permit her to prosecute her action of ejectment and that as naked trustee of the title she should be required to convey it to appellant.

An injunction, temporary and permanent, was prayed and that Mary H. Atcherley, the defendant, be declared trustee and be required to convey the property to complainant.

Copies of the proceedings referred to in the bill were annexed to it as exhibits. Among these, we have seen, were the award of the Land Commission and the royal title. The latter recites that—

"Whereas the Board of Commissioners to Quiet Land Titles has awarded to Kinimaka by award No. 129 a freehold estate less than allodial in the premises mentioned below, and,

"Whereas, Kinimaka has paid into the government treasury eighty-two and 50/100 Dollars for the government's rights in said land,

"Therefore, by this Royal Patent Kamehameha III . . . shows . . . that he has conveyed and

granted in fee simple to Kinimaka that land at Honolulu on the Island of Oahu with these boundaries . . . It is granted in fee simple to him, his heirs and devisees. . . ."

The lands in suit were part of the lands conveyed.

Mary H. Atcherley, then being sole defendant, demurred to the bill on the ground that it did not set out a cause of action.

By stipulation of the parties, in order to determine the question whether the decree of 1858 was *res adjudicata*, the circuit judge made a *pro forma* ruling sustaining the demurrer to the bill and dismissing it.

The complainant appealed to the Supreme Court of the Territory, it being stipulated that complainant should do so.

The Supreme Court reversed the decree. 14 Hawaii, 651. In its opinion it recited the facts with great fullness, completed the allegations of the bill by the exhibits attached, and then disposed of the contentions as follows:

1. The decree adjudging Kalakaua to be the owner of the land and requiring conveyance of it to be made to him by Armstrong as guardian of the children of Kinimaka was not ambiguous, but it took certainty from the averments of the bill and the record and there could "be no doubt that it was the intention of the court to order the conveyance of the interests of the minors."

2. The minors were bound by the decree notwithstanding "they were not named as parties defendant in the suit." This was decided on the authority of Hawaiian cases and the power of guardians over the estates of their wards established by them and upon the general principle of collateral attacks upon judgments. And specifically replying to the contention that the decree was not binding because of "the lack of service and upon the merits" and that the court should refuse to enforce the decree, it was said:

"It is not contended that the court must in all such cases reëxamine the former proceedings but merely that it may, in its discretion, do so. Assuming that to be so, we decline to retry the old case. The guardian appeared and contested the complainant's claim, presenting in opposition substantially the same views now sought to be urged by the respondent. The ward's interest were not permitted to go by default but were fully defended by counsel. The decree, while not carried out by the execution of a conveyance, was in fact acquiesced in, as appears by the bill, by all concerned and complainant and his successors in interest from that time continuously until about January, 1900, held open, notorious and undisturbed possession of the land. Under the circumstances, and after a lapse of more than forty years, we do not think that the court should examine into the merits of the former proceedings or refuse to enforce the decree for the reasons suggested."

Upon the filing of the mandate of the Supreme Court in the court below Mary H. Atcherley filed an answer in which she admitted many of the allegations of the bill, denied some—among others, the undisturbed possession of the land in Kalakaua and his successors, as alleged, and the inferences from it—asserted the validity of her title, and the staleness of complainant's demand, it having been "brought forty-three years or more than four times the term of the statute of limitations since the alleged date of the alleged decree ordering Richard Armstrong to give a conveyance." That to enforce a conveyance from her without giving her an opportunity to be heard upon the matters set forth in the bill would deprive her of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

By a supplemental answer she alleged the following, which we state narratively:

Since the filing of the answer the complainant Kapiolani

Estate, Limited, has parted with all of its estate in the land by a deed of a small portion to certain named parties and the balance, with covenants of warranty, to Lewers and Cooke, Limited, a Hawaiian corporation.

June 29, 1906, that corporation brought suit in the Court of Land Registration to register its title to the land conveyed. September 16, 1907, it was decreed that the corporation had a good title which was entitled to registration. The decree was reversed by the Supreme Court of the Territory March 5, 1908, that court holding that the corporation had no title, legal or equitable, to the land. 18 Hawaii, 625. The case was remitted to the Court of Land Registration for further proceedings and that court dismissed the petition of the corporation. The latter appealed from the decision to the Supreme Court of the Territory, which court modified the decree and on March 24, 1909, entered a final decree that the corporation had no title, legal or equitable, to the land. 19 Hawaii, 334. Upon appeal to this court the decision was affirmed. [*Lewers & Cooke, Ltd.*, v. *Atcherley*, 222 U. S. 285.]

The decree of the Supreme Court of Hawaii is in full force and effect and it is alleged that the "proceedings in the Court of Land Registration, Supreme Court of Hawaii and Supreme Court of the United States were upon the merits of the case and the cause of action so finally adjudicated was the same right and cause of action as that on which complainant in this case has founded its bill."

There was a replication to the answer and an amendment to the amended bill, and it appears that Mary H. Atcherley conveyed an undivided half of the property to Lyle A. Dickey and Edward M. Watson, two of the defendants. They were made parties by consent and answered in the case, in effect repeating the answers of their grantor.

It was decreed that (1) the allegations of the bill and replication of complainant were true. (2) The defendants

and each of them were estopped from litigating against or in opposition to the claim of complainant. (3) The defendants held the legal title to the land as tenants in common, one-half by Mary Atcherley and one-fourth by each of the other defendants. (4) Such title and titles were held by the defendants respectively as trustees for complainant and that each of them should be decreed to execute conveyance thereof to complainant, all and singular, the matters appertaining to the title having theretofore been litigated between the predecessors in title of the complainant and defendants respectively, and that the same were *res judicata.* (5) Defendants should be permanently enjoined from further prosecuting that certain action in ejectment then pending on the law side of the court, wherein Mary H. Atcherley was plaintiff and complainant was defendant.

A conveyance was decreed to be made accordingly and in case of default after thirty days the clerk of the court as its commissioner should make such deed. Further prosecution of the action in ejectment was enjoined.

The decree was reversed by the Supreme Court of the Territory.

The opinion is somewhat difficult of condensation. It rapidly reviews the steps in the litigation exhibited in 14 Hawaii, 651; 18 Hawaii, 625; 19 Hawaii, 47 and 334; and 222 U. S. 285. Then this comment was made:

"Notwithstanding the statement made in the Lewers & Cooke case (19 Hawaii, 48) that there had been no reversal of the facts found by the court of land registration, the fact found by that court that Kinimaka 'was the natural guardian of the minor' was not included in the findings of fact certified up by this court on the appeal to the United States Supreme Court. And the fact that the guardianship relation existed, vitally important though it was, seems to have received scant consideration in that case. That Kinimaka was the testamentary guardian of

Kalakaua's property seems to be beyond the range of dispute at this time. If the relation existed in fact a question as to the regularity of the appointment would not prevent the assertion of any rights the ward would otherwise have against the guardian. 'It is not essential that a legal guardianship should exist; the doctrine (constructive fraud) applies wherever the relation subsists in fact.' 2 Pom. Eq. Jur. Sec. 961.

"We are satisfied that this court fell into error in the Lewers & Cooke case in taking the view that the equity suit before Chief Justice Allen constituted an attack on the award of the land commission and that the decree in that suit amounted to a setting aside of the award. None of the prior decisions in this jurisdiction which were cited in support of the view taken are authority for the conclusion reached, as an examination of them will show."

Hawaiian cases were reviewed and the court said:

"The question now presented is whether a minor on coming of age could obtain relief in equity against a guardian who had, in fraud of his ward, presented a claim and obtained in his own name an award from the land commission of title to the minor's land. This question was neither involved nor discussed in any of those cases.

"The case of the guardian of a minor obtaining an award in his own name of land belonging to his ward is analogous to the case of a guardian who purchases land with money belonging to the ward, and, in violation of his fiduciary duty, intentional or otherwise, takes the title in his own name. In such a case it is well settled, equity, regarding the land as being the property of the ward, will declare and enforce a constructive trust in favor of the ward and order the conveyance of the legal title. 3 Pom. Eq. Jur. Secs. 1052, 1058."

After further review of the case and consideration of the rights of Kalakaua, the action and duty of Kinimaka, the character and effect of the proceedings which he had in-

stituted and which were instituted against him by Kalakaua and, after his death, against his devisees, the court declared that certain principles resulted therefrom and that "within these principles, then, the decree of 1858 was not erroneous but right."

The character of the awards of the Land Commission was considered and described and their proper relation to the questions and rights of the parties in the case; and this was said: "If the decree in *Kalakaua* v. *Pai and Armstrong* was right it ought to be enforced. If the decision in the *Lewers & Cooke Case* was correct the present bill should be dismissed, but if it was wrong, in justice to the appellee, it ought not to be followed if it can be avoided.

"Being of the opinion that this court was wrong in the conclusion reached in the *Lewers & Cooke Case,* and that the decree of 1858 was not 'erroneous in a fundamental principle,' and, for the reasons stated in the former opinion in the case at bar, should not be reopened, we should feel inclined to depart from the ruling made in the *Lewers & Cooke Case* were we not bound by it because of its having been affirmed by the United States Supreme Court.

* * * * * * * *

"It makes no difference that in making that decision the Supreme Court followed the opinion of this court upon a matter of local law (222 U. S. 294), and that we now believe that that opinion was not well founded. If the former ruling is to be reversed the reversal is to be made by that court and not this. The most that we can do now is to respectfully point out wherein, in our judgment, the former opinion was wrong. This we have done, believing it was our duty to do it, and with this our duty in the premises ends."

We have been at pains to recite the pleadings in the case, the steps in the litigation they detail, and the ruling and comments of the Supreme Court in order to bring the factors of judgment under review in proper connection

and to estimate the constraint the court deemed that it was under to follow the decision of this court in the *Lewers & Cooke Case*, and whether the court was justified in its view of that case.

The case at bar easily resolves itself into a few simple facts and principles which may be summarized from the pleadings and findings of fact. Kaniu, whose adopted son Kalakaua was, on the day of her death, by oral will and according to the custom of the country, appointed him her heir and left him all of her property. Kinimaka was Kalakaua's guardian, and, at a session of the Board of Land Commissioners, procured the land to be awarded to himself. Then followed litigation—commenced by Kalakaua, to declare Kinimaka his trustee of the title—which continued after the latter's death against his children, properly represented, and his widow, which resulted in the decree (November 2, 1858) establishing Kalakaua's title to the land.

The decree was not complied with as directed but was in effect obeyed, and Kalakaua retained possession of the land and he and his successors have ever since continued in the open possession of it, of which possession the children of Kinimaka were aware and at no time asserted any claim to the lands or denied the rights of Kalakaua and his successors thereto, but at all times acquiesced in the possession of Kalakaua and his successors in title.

Then came the action of ejectment by defendant Atcherley and this suit to enjoin its prosecution.

The bill was dismissed upon demurrer and the case carried to the Supreme Court of Hawaii, which reversed the decree.

Pending the suit the complainant transferred its interest by warranty deed to Lewers & Cooke, Limited. The latter instituted suit in the Court of Land Registration to register its title, and it was decreed by that court that it had a good title which was entitled to be registered. The

decree was reversed by the Supreme Court of Hawaii and subsequently this court affirmed the judgment of the Supreme Court.

The determining proposition in the case (*Lewers & Cooke Case*) was that the award of the Land Commission was "conclusive against every form of attack" except by appeal by a party who had presented his claims to the Board. The court considered it immaterial from whom Kinimaka received the lands or whether he was guilty of actual fraud or had an honest belief in his title. And it was said: "The objection to the decree of 1858 appears to go to the jurisdiction of the court over the subject matter, for the Land Commission's award was the final decision of a court of record which was the only court of competent jurisdiction to decide claims to land accruing prior to its establishment, and its decision could not be attacked except by appeal provided by law." But the court further said that even if the objection did not go to the jurisdiction of the court, the result would be the same because of the finality of the Land Commission's award. 18 Hawaii, 625, 638, 639. See also 19 Hawaii, 47, 334.

The suit in the Court of Land Registration and the action of the courts thereunder were set up in the present suit as *res judicata*. The trial court decided against the defense and other defenses, and decreed the relief prayed by complainant. The decree was reversed by the Supreme Court.

We have given excerpts from the opinion of the court showing the grounds of its action. It will be observed that the court frankly declared that it had fallen into error in the *Lewers & Cooke Case* by deciding that the equity suit in which the decree of 1858 in favor of Kalakaua was rendered was an attack on the award of the Land Commission and that the decree amounted to a setting aside of the award, but felt that it was its duty to adhere to the decision as it had been affirmed by this court, and, explaining

our affirmance, said that the "vitally important" fact that Kinimaka "was the natural guardian of the minor [Kalakaua] was not included in the findings of fact certified up." And the court (Supreme Court of Hawaii) declared: "That Kinimaka was the testamentary guardian of Kalakaua's property seems to be beyond the range of dispute at this time." This relationship necessarily was the important fact. Without it Kalakaua had no claim of title; with it his right and the right of complainant as his successor are established and the decree of 1858 establishing his title was correct and the decree in the *Lewers & Cooke Case* erroneous.

But defendants say, granting the latter decree was erroneous, the decree of 1858 was also erroneous, and that the case then presents the opposition of one erroneous judgment to another and the last should prevail. And to establish that the decree of 1858 was erroneous they enter into a discussion of the laws of Hawaii, the consideration of the principles upon which the Hawaiian Monarchy was established in 1845–7, the abolition of the old feudal tenures of land, the creation of a court (the Board of Land Commissioners) to quiet land titles, the awards of which were to be final, and the foundation of fee simple titles to the Kingdom. But the contentions thus presented have intricate character, and can only have clear comprehension in local experience and understanding and are best determined by local interpretation and the decisions of the courts "on the spot"; and this we recognized when we affirmed the decree in the *Lewers & Cooke Case*. The powers of the Land Commission, we said, "involve obscure local history concerning a time when the forms of our law were just beginning to superimpose themselves upon the customs of the islanders. Such customs are likely to be distorted when transmitted into English legal speech."

And such consideration and defense moved or tended to move to the decision in the case. A reference, it is true,

was made to the contention that Kinimaka was guardian of Kalakaua, but the fact was dismissed as being a suggestion having no substantial foundation, and also, again deferring to the local judgments, it was said of the suggestion that "it would be going very far to apply the refined rules of the English Chancery concerning fiduciary duties to the relations between two Sandwich islanders in 1846 on the strength of such a fact."

This relationship has since been cleared up and given definite obligations and duties, and even in 1846 under the law of the islands a guardian could not through the instrumentality of an award of the Land Commission obtain a title to the property of his ward which was immune from subsequent attack and the wrong of it be without redress. The fact of guardianship being established, and such being its legal consequences under the law of Hawaii, according to the latest decision of the Supreme Court of Hawaii, it would be going far to say that a decision was intended to be made against it by the comment which we have mentioned, or by the other comments in the opinion.

For instance, the present case was referred to as pending and it was said that as it had not passed to a final decree there was nothing in the form of action of the court to hinder the court from adopting the principle laid down, even though it thereby should overrule an interlocutory decision previously reached. And we may add that there was nothing to hinder the court from changing its action, which it did, we have seen, on a different view of the law, or the complainant from availing itself of such change, unless indeed the first decision had the finality of *res judicata*.

This is contended, it being urged that the decision of the Land Commission had such binding effect as well on complainant as on Lewers & Cooke, Limited. The contention is based on the following findings of fact:

"In the suit of Lewers & Cooke, Limited, referred to in

these findings, C. W. Ashford, then vice-president of Kapiolani Estate, Limited, and now its counsel in this case, appeared at the trial in the Court of Land Registration and assisted counsel for Lewers & Cooke, Limited, in the conduct of the case by examining three witnesses, and did this at the request of John F. Colburn, who was the treasurer of Kapiolani Estate, Limited, and the officer of Kapiolani Estate, Limited, who in the regular course of business employed attorneys for it. Said John F. Colburn was a witness on behalf of Lewers & Cooke, Limited, at that trial.

"Messrs. Kinney, Marx, Prosser & Anderson, while attorneys for Kapiolani Estate, Limited, in this case, were retained by Kapiolani Estate, Limited, through John F. Colburn, its treasurer, to appear as counsel for Lewers & Cooke, Limited, at two hearings before the Supreme Court of Hawaii subsequent to the final decision, and so appeared, and also, on such retainer, signed the assignment of errors upon appeal from the Supreme Court of Hawaii by Lewers & Cooke, Limited, to the Supreme Court of the United States. The Kapiolani Estate, Limited, was not, however, named as a party to said suit of Lewers & Cooke, Limited, and its counsel took no further part by its direction in the proceedings."

In passing on the contention the Supreme Court of Hawaii said: "Counsel for appellants [appellees here] contend that under the decree in the *Lewers & Cooke Case* the whole matter is *res judicata*. But as the appellee [appellant here] was not a party to that case and is not a privy of Lewers & Cooke, Limited, the ground is untenable." As to the last proposition, that is, that complainant was not a privy of Lewers & Cooke, Limited, the view of the court seems to be sustained by *Wood* v. *Davis*, 7 Cranch, 271, and *Cadwallader* v. *Harris*, 76 Illinois, 370. The first proposition is one of fact. There was a distinct issue upon the fact and the conclusion of the court was

virtually a decision upon the issue that the acts described were not authorized by the complainant corporation but were individual. And we may say it is disputable besides if they constituted an appearance of the complainant. *Schræder* v. *Lohrman*, 26 Minnesota, 87.

The principle invoked by defendants is that one who warrants a title is concluded by a judgment against the title in a suit brought against his grantee, even when the title is aggressively used. *Andrews* v. *Denison*, 16 N. H. 469. But in favor of whom and under what conditions? In favor of the grantee undoubtedly when he brings suit on his covenant against his vendor. But will it be available in favor of the successful assailant of the title? *Wood* v. *Davis* and *Cadawallader* v. *Harris*, *supra*, are authority against the proposition.

But, granting this is disputable, and cases may be cited the other way, it is well established that in order to make the judgment available even to the grantee of the title his covenantor must receive notice of the suit and an opportunity to defend it. Such notice was not proven in this case. We certainly cannot assume that notice was given against the decision of the Supreme Court virtually to the contrary, accepting, indeed, the finding of the trial court. The trial court, as we have seen, found that the allegations of fact contained in complainant's bill of complaint, as finally amended herein, and in its said replication, were true. The replication contained a denial of the averment of the supplemental answer that complainant had notice of the proceedings in the Court of Land Registration, the Supreme Court of Hawaii or the Supreme Court of the United States, though it admitted "that certain of its officers and directors in their capacity as individuals (but not in their capacity as such officers or directors of said complainant corporation) were aware of the pendency of said proceedings."

Decree reversed and cause remanded for further proceedings in accordance with this opinion.

UNITED SURETY COMPANY *v.* AMERICAN FRUIT PRODUCT COMPANY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 203. Submitted May 12, 1915.—Decided June 14, 1915.

The right given to this court by the sixth clause of § 250, Judicial Code, to reëxamine the judgment of the Court of Appeals of the District of Columbia in cases in which the construction of any law of the United States is drawn in question by the defendant, is confined to the construction of laws of general application throughout the United States, and does not include laws local in their application to the District of Columbia. *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491.

Quære, whether under the third clause of § 250, Judicial Code, this court may not examine the judgment of the Court of Appeals of the District of Columbia where the constitutionality of a statute of the United States, whether general or local to the District, is involved.

Sections 454 and 455 of the District Code are not unconstitutional because they provide that a surety, by executing the undertaking to release property attached, is bound by the judgment against the principal, although it has no right to be heard, whether the value of the property released be fixed by appraisal or by the court. *Beall* v. *New Mexico*, 16 Wall. 535.

A constitutional question that has no real foundation cannot be put forward as a mere pretext to open other questions that otherwise could not come before this court. *Goodrich* v. *Ferris*, 214 U. S. 71.

Writ of error to review 40 App. D. C. 239, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the Court of Appeals of the District of Columbia under § 250, Judicial Code, are stated in the opinion.

Mr. Wade H. Ellis, *Mr. R. Golden Donaldson*, *Mr. Charles Cowles Tucker* and *Mr. Abner H. Ferguson* for plaintiff in error.

Mr. George E. Hamilton, Mr. John W. Yerkes and *Mr. John J. Hamilton* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit originally brought by the defendant in error against the Semmes-Kelly Company in the Supreme Court of the District to recover $10,596.45 for goods sold. There was an attachment of a stock of goods that were worth much more than the judgment finally recovered, but never were formally appraised, and the next day the plaintiff in error as surety to the Semmes-Kelly Company signed an undertaking to release the property attached, in the form provided in the District Code, § 454. By that instrument it in terms submitted to the jurisdiction of the court and undertook 'to abide by and perform the judgment of the court in the premises in relation to said property, which judgment may be rendered against all the parties whose names are hereto subscribed.' By § 455 if the judgment goes for the plaintiff 'it shall be a joint judgment against both the defendant and his surety or sureties in said undertaking for the appraised value of the property.' After a second trial, judgment was entered against the Semmes-Kelly Company and the plaintiff in error for $9,937.90, that sum being found to be far less than the value of the property, as we have said. 40 App. D. C. 239.

The jurisdiction of this court is invoked upon a contention that the above §§ 454 and 455 as applied deprive the plaintiff of its property without due process of law. In *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491, it was held that the right to reëxamine a judgment of the Court of Appeals given by the Judicial Code, § 250, 'Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant,' was confined to the construction of laws having general application throughout the United States. But

in the same case it was left open whether the third clause, 'Cases involving . . . the constitutionality of any law of the United States,' did not have a wider meaning, and that suggestion is relied upon for the present attack upon the two sections of the District Code.

There is no occasion to discuss it in this case. That a man may contract to be bound by a judgment in which he has no right to be heard and that a statute may authorize him to make himself a party to such a judgment was decided, if it needed a decision, in *Beall* v. *New Mexico*, 16 Wall. 535. It is argued that there is a difference if the value of the property is not appraised but fixed by the court. But there is nothing to hinder a man from assenting to that as well as to the rest if the statute permits it. The suggestion that there is a constitutional difficulty has no foundation. It is true that the section of the Code speaks only of appraised value, but if by a reasonable construction appraisal is held to be a superfluous form when there is no question that the property attached is worth much more than the judgment, the omission must be taken to have been contemplated by the surety when he signed. The constitutional point is a mere pretext put forward in order to open other questions that otherwise could not come here. That pretext is not allowed to succeed, *Goodrich* v. *Ferris*, 214 U. S. 71, 79, and therefore we shall not deal with the attempt to obtain a reversal of the decision upon a construction of the local statute by the local court, not so manifestly absurd as to extend the surety's liability in a way that could not have been foreseen, or matters of local practice, such as holding that when the first verdict against the Semmes-Kelly Company and a joint judgment were set aside and the case put on the trial calendar, on the motion of the plaintiff in error, 'as against' it, the whole judgment was annulled.

Writ of error dismissed.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, STATE OF PENNSYLVANIA.

No. 263. Argued May 5, 6, 1915.—Decided June 14, 1915.

A State may tax life insurance companies upon business done within the State and measure the tax upon the premiums on policies of residents of the State; and, in estimating the amount of premiums, those paid by residents to foreign insurance companies outside of the State may be included without depriving such companies of their property without due process of law.

Taxation has to be determined by general principles.

The Pennsylvania Act of 1895, levying a tax of two per cent. on gross premiums, of life insurance companies received for business done within the State, does not amount to taxing property beyond its jurisdiction as to the premiums paid directly to a corporation outside of the State. *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, distinguished.

239 Pa. St. 288, affirmed.

THE facts, which involve the constitutionality under the due process clause of the Fourteenth Amendment of a statute of Pennsylvania taxing the gross premiums on life insurance policies issued within the State, are stated in the opinion.

Mr. Charles W. Pierson and *Mr. Wm. S. Snyder*, with whom *Mr. Thomas DeWitt Cuyler* was on the brief, for plaintiff in error:

The assumption by a state court of a fact not in evidence as a basis for decision is a denial of due process of law.

The tax sought to be collected is a property tax, and as such cannot be collected.

The construction given to the act of 1895 deprives the society of its property without due process of law.

A State may not impose on a foreign corporation seeking to enter its borders such conditions as deprive it of rights guaranteed by the Federal Constitution.

In support of these contentions, see *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Ashley* v. *Ryan*, 153 U. S. 436; *Atchison &c. Ry.* v. *O'Connor*, 223 U. S. 280; *Atlantic & Pac. Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Chi., B. & Q. R. R.* v. *Chicago*, 166 U. S. 226; *Pennsylvania* v. *Hulings*, 129 Pa. St. 317; *Pennsylvania* v. *Lehigh Valley R. R.*, 104 Pa. St. 89; *Pennsylvania* v. *Standard Oil Co.*, 101 Pa. St. 119; *Pennsylvania* v. *Westinghouse Co.*, 151 Pa. St. 265; *Del., Lack. & West. R. R.* v. *Pennsylvania*, 198 U. S. 341; *Fargo* v. *Hart*, 193 U. S. 490; *Fayerweather* v. *Ritch*, 195 U. S. 276; *Firemen's Association* v. *Scranton*, 217 Pa. St. 585; *Frawley* v. *Pennsylvania Casualty Co.*, 124 Fed. Rep. 259; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Harrison* v. *St. L. & San Fran. R. R.*, 232 U. S. 318; *Insurance Co.* v. *Commonwealth*, 87 Pa. St. 173; *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146; *Mutual Life Ins. Co.* v. *Girard Life Ins. Co.*, 100 Pa. St. 172; *N. Y. Life Ins. Co.* v. *Head*, 234 U. S. 149; *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S. 8; *Postal Tel. Co.* v. *Taylor*, 192 U. S. 64; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *West. Un. Tel. Co.* v. *Frear*, 216 Fed. Rep. 199; see also Acts of April 11, 1868, Pennsylvania cited, P. L. 83; 1873, P. L. 20; 1874, P. L. 109; 1879, P. L. 112; 1889, P. L. 420; 1895, P. L. 408; 1911, P. L. 607.

Mr. William M. Hargest, Second Deputy Attorney General of the State of Pennsylvania, with whom *Mr. Francis Shunk Brown*, Attorney General of the State of Pennsylvania, was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The Equitable Life Assurance Society of the United States, the plaintiff in error, does business in Pennsylvania. By an act of June 28, 1895, that State levies an annual tax of two per cent. upon the gross premiums of every character received from business done within the State during the preceding year. The Company paid large taxes under this act, but appealed to the state courts from charges made by the State Accounting Officer in respect of premiums for the years 1906, 1907, 1908, 1909 and 1910, paid to the Company outside the State by residents of Pennsylvania. The Supreme Court sustained the charge. 239 Pa. St. 288. The whole discussion there was whether these items fell within the statute. On that point of course the decision of the state court is final, and as the Company is a foreign corporation and this is held to be a tax for the privilege of doing business in the State, it is obvious that the scope of the question before us is narrow, being only whether the statute as construed deprives the Company of its property without due process of law, contrary to the Fourteenth Amendment, as alleged. It is true that the plaintiff in error suggests a further infraction of that amendment in an assumption by the Supreme Court of an unproved fact: that the beneficiaries of the policies lived in Pennsylvania. But it is enough to answer that we understand the decision when it uses the word beneficiaries to mean parties to the contracts, the insured, and that the assumption was warranted by the record as to them.

The grounds for the only argument open are that a State cannot tax property beyond its jurisdiction, *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; that it cannot effect that result indirectly by making the payment a condition of the right to do local business, *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v.

Kansas, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; and that as it could not prohibit the contracts it cannot impose the tax. *Allgeyer* v. *Louisiana*, 165 U. S. 578. In aid of the effort to make the foregoing decisions applicable it is argued that this is a property tax. But, as we have said, the Supreme Court of Pennsylvania speaks of it as a tax for the privilege of doing business within the Commonwealth, and whether the statement is a construction of the act or not we agree with it so far at least as to assume that if that characterization is necessary to sustain the tax, the Legislature meant to avail itself of any power appropriate to that end.

Without going into any preliminary matters that might be debated it is enough for us to say that we agree with the Supreme Court of the State in its line of reasoning; applying it to the claim of constitutional rights which that court did not discuss. The question is not what is doing business within a State in such a sense as to lay a foundation for service of process there. It being established that the relation of the foreign company to domestic policy holders constituted doing business within the meaning of the statute, the question is whether the Company may be taxed in respect of it, in this way, whatever it may be called. We are dealing with a corporation that has subjected itself to the jurisdiction of the State; there is no question that the State has a right to tax it and the only doubt is whether it may take this item into account in fixing the figure of the tax. Obviously the limit in that regard is a different matter from the inquiry whether the residence of a policy holder would of itself give jurisdiction over the Company. The argument of the state court is that the Company is protecting its insured in Pennsylvania equally whether they pay their premiums to the Company's agent in Philadelphia or by mail or in person to another in New York.

These are policies of life insurance and according to the

statement of the plaintiff in error are kept alive and renewed to residents of Pennsylvania by payments from year to year. The fact that the State could not prevent the contracts, so far as that may be true, has little bearing upon its right to consider the benefit thus annually extended into Pennsylvania in measuring the value of the privileges that it does grant. We may add that the State profits the Company equally by protecting the lives insured, wherever the premiums are paid. The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 162, 163. As to that a certain latitude must be allowed. It is obvious that many incidents of the contract are likely to be attended to in Pennsylvania, such as payment of dividends when received in cash, sending an adjuster into the State in case of dispute, or making proof of death. See *Connecticut Mut. Life Ins. Co.* v. *Spratley*, 172 U. S. 602, 611; *Pennsylvania Lumbermen's Mut. Fire Ins. Co.* v. *Meyer*, 197 U. S. 407, 415. It is not unnatural to take the policy holders residing in the State as a measure without going into nicer if not impracticable details. Taxation has to be determined by general principles, and it seems to us impossible to say that the rule adopted in Pennsylvania goes beyond what the Constitution allows.

Judgment affirmed.

PERRYMAN *v.* WOODWARD.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 277. Argued May 12, 13, 1915.—Decided June 14, 1915.

The Townsite Commission of Muskogee Creek Nation Indian Territory awarded a lot to the party having the possessory right thereto and thereafter, in 1904 the party having died in 1900, made a deed purporting to convey the property to him. Immediately after his death the probate court made a decree that the intestate's estate did not exceed three hundred dollars and that it absolutely vested in the widow who meanwhile sold the lot. In a suit brought by the children of the intestate against the grantee of the widow *held* that:

The effect of the act of June 25, 1910, c. 431, § 32, 36 Stat. 855, in regard to deeds to tribal lands in the Five Civilized Tribes issued after the death of the party entitled was to make the patented lands part of the estate of the nominal party as though the deed had issued during his life; it did not exclude provisions of law otherwise applicable, and if the proper probate court had jurisdiction to make the decree when made the act of 1910 simply established the validity of the title.

In 1900, under the Act of May 2, 1890, c. 182, c. 31, 26 Stat. 81, § 3 of Ch. I of Mansfield's Digest of the Laws of Arkansas providing that where decedent's estate was less than three hundred dollars it vested absolutely in the widow was in force, and the grantee of the widow obtained good title whether the order of the probate court was made before or after the purchase.

When the question is whether a particular law of Arkansas was or was not put into effect by the act of May 2, 1890 in the Indian Territory, this court has jurisdiction to review the judgment of the state court of Oklahoma under § 237, Jud. Code, although if such question were not involved, the construction of the law itself would be a matter of local law and not reviewable by this court.

37 Oklahoma, 792, affirmed.

THE facts, which involve questions of title to land in Muskogee Creek Nation Indian Territory awarded by the townsite commission and the construction of the laws of descent applicable to the property, are stated in the opinion.

Mr. B. B. Blakeney, with whom *Mr. James H. Maxey* was on the brief, for plaintiffs in error:

As to the construction of the treaties of the Creek Nation with reference to the patenting of town property, and the acts of Congress in connection therewith, see Section 23, Original Creek Treaty, 31 Stat. 861; § 5, Act of April 26, 1906, 34 Stat. 137; § 15, Act of June 28, 1898, 30 Stat. 495; *Hy-yu-tse-mil-kiu* v. *Smith*, 194 U. S. 401; *McKay* v. *Kalyton*, 204 U. S. 458; *Bond* v. *United States*, 181 Fed. Rep. 613; *Parr* v. *United States*, 153 Fed. Rep. 462; *deGraffenried* v. *Iowa Land Co.*, 20 Oklahoma, 687; *Iowa Land Co.* v. *United States*, 217 Fed. Rep. 11.

As to the proper construction of § 31 of the Act of May 2, 1890, c. 182, 26 Stat. 81, see § 3, Chapter 1, Mansfield's Digest; *Winters* v. *Davis*, 51 Arkansas, 335; *McAndrews* v. *Hollingsworth*, 72 Arkansas, 446; *Griffin* v. *Dunn*, 79 Arkansas, 408; *Cherokee Const. Co.* v. *Harris*, 122 S. W. Rep. 485; *State* v. *Ellis*, 22 Washington, 129; *Thompson* v. *Utah*, 130 U. S. 343; *Smythe* v. *Smythe*, 28 Oklahoma, 266; *Frick* v. *Oates*, 20 Oklahoma, 473; *DeGraff* v. *State*, 2 Okla. Crim. Rep. 519; *Sanger* v. *Flow*, 48 Fed. Rep. 152; *Zufall* v. *United States*, 1 Ind. Ter. 639; *Appollos* v. *Brady*, 1 C. C. A. 299; *Nat. L. S. Com. Co.* v. *Taliaferro*, 20 Oklahoma, 177; *Capital Traction Co.* v. *Hoff*, 174 U. S. 1; *Inland Coasting Co.* v. *Hall*, 124 U. S. 121.

When the trial court reverses the order of the Master in excluding evidence, it should order the cause re-referred or open the case for admitting such evidence, and affording the adverse party the opportunity of introducing explaining or rebuttal evidence. *Matter of Friend*, 50 N. Y. Supp. 954; 17 Enc. of Pl. & Pr. 1057; *Central Trust Co.* v. *Ga. Pac. Ry.*, 83 Fed. Rep. 386; *Brueggestradt* v. *Ludwig*, 184 Illinois, 24; *Wall* v. *Stapleton*, 177 Illinois, 357; *Severance* v. *Hilton*, 32 N. H. 289; *Bellows* v. *Ingram*, 2 Vermont, 575; *American Hoist Co.* v. *Hall*, 208 Illinois, 597; *Guaranty Bond Co.* v. *Edwards*, 104 S. W. Rep. 642.

Mr. Joseph C. Stone for defendant in error, submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to quiet title to a parcel of land in Oklahoma brought by the children and heirs of Squire Saunders against a purchaser of the land from his widow. The defendant had a decree in her favor in the state court. 37 Oklahoma, 792, 799. The title of the defendant depends upon the effect of a decree of the Probate Court made on November 16, 1900, finding that the estate of Squire Saunders did not exceed three hundred dollars and ordering and adjudging that the same do vest absolutely in his widow. If valid, it is decided that this decree embraces the land in controversy. Squire Saunders having the possessory right to the lot, which lay in the town of Muskogee, Creek Nation, Indian Territory, it was awarded to him by the townsite commission. On October 22, 1900, he died intestate. On January 26, 1904, a deed was made by the principal Chief of the Muskogee (Creek), Nation, approved by the Secretary of the Interior, purporting to convey the same to him.

The act of June 25, 1910, c. 431, § 32, 36 Stat. 855, 863, provided that "where deeds to tribal lands in the Five Civilized Tribes have been or may be issued . . . to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life." The intent and meaning of this statute in our opinion was to make the patented land part of the estate of the nominal patentee *quoad hoc*—the most important words being 'as if the deed had issued to the deceased grantee during life.' The section was not intended to exclude other provisions of law otherwise applicable, and to give a title at all events

to the heir or other party named in the act as purchaser. For other illustrations of heirs not taking as purchasers under statutes see *McDougal* v. *McKay*, 237 U. S. 372; *Pigeon* v. *Buck*, 237 U. S. 386, April 26, 1915; *Mullen* v. *United States*, 224 U. S. 448. If the statute under which the above-mentioned probate decree was made was in force when the decree was passed, the later act does not attempt to deprive it of effect, but only establishes the validity of the Saunders title beyond a doubt. Therefore we pass to the consideration of the earlier laws.

The act of Congress of May 2, 1890, c. 182, § 31, 26 Stat. 81, 94, adopted and extended over the Indian Territory certain general laws of Arkansas 'in force at the close of the session of the general assembly of that State of 1883, as published in 1884 in the volume known as Mansfield's Digest,' &c. One of these was chapter one, the provisions relating to administration, by § 3 of which if the estate of the deceased does not exceed $300 the Probate Court is to make an order that the estate vest absolutely in the widow or children, as the case may be. The state court held that this section was extended over the Indian Territory whether it was in force in Arkansas or not, an erroneous principle, as decided in *Adkins* v. *Arnold*, 235 U. S. 417; but if the section was in force in Arkansas the decision may be right in its result. Whether the section was in force is the main question in the case, and as this is, in effect, a question whether the act of Congress adopted it, it may, without much stretching, be regarded as open to review in this court, although if it were one degree more remote and concerned the construction of an Arkansas act admitted to be in force it would be treated as involving only a local law. See *Shulthis* v. *McDougal*, 225 U. S. 561, 571; *United States* v. *Pridgeon*, 153 U. S. 48, 53, 54.

The constitution of 1874 (Art. 9, § 6), gives the occupation of the homestead of the deceased to his widow for

life. (The minor children take half during minority, but there were no minor children in this case.) This section was held to be paramount, so far as it goes, in *Winters* v. *Davis*, 51 Arkansas, 335. But neither the constitution of Arkansas nor the chapter of Mansfield's Digest (75), dealing with the devolution of homesteads was put in force in the Indian Territory, so we are concerned only with § 3 of Chapter 1 of the adopted laws. So far as it bears upon the present case we see no reason to doubt that it was in force, its displacement as to homesteads not being material here. If it was in force, it does not matter that the defendant purchased from the widow in 1900, before the decree of the Probate Court was made. There was nothing in the acts of Congress to prevent it and no reason appears why the widow's title may not have enured to her grantee as held by the Supreme Court Commission; but that does not concern the plaintiffs if the widow got a good title as against them.

The Master to whom the case was referred to take the proof and report his findings of fact and conclusions of law was of opinion that the widow's interest 'was purely that of dower' and excluded the decree of the Probate Court. But he attached it to his report and the decree was considered by the courts, as we have indicated. The plaintiffs contend that thereby they have been prevented from introducing evidence to control the effect of the alleged decree. This is a matter of local practice that does not concern us. It was disposed of by the courts of the State.

Decree affirmed.

DES MOINES GAS COMPANY *v.* CITY OF DES MOINES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

No. 75. Argued November 10, 11, 1914.—Decided June 14, 1915.

The public authority is presumed to have acted fairly, and the burden of proof is on a public utility corporation to show that a regulating ordinance has the effect to deprive it of an income equivalent to a fair return upon its property dedicated to public use. *Knoxville* v. *Water Co.*, 212 U. S. 1.

Good will, in the sense generally used as indicating that element of value which inheres in the fixed and favorable consideration of customers arising from an established and well known and well conducted business, has no place in the fixing of valuation for the purpose of rate making of public service corporations. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19.

There is, in some cases, a "going concern value" which is an element to be considered in determining valuation on which the owner is entitled to a fair return although the property is dedicated to a public use; there is no fixed rule for ascertaining this but each case must be controlled by its own circumstances.

Where, as in this case, the Master after exhaustive testimony certifies the value of a long established and successful public service plant, for rate making purposes, upon the basis of a plant in successful operation and overhead charges have been allowed, the court will presume that the element of going concern value has been considered and included in the total value certified.

The court will not regard the refusal of the lower court to enjoin a rate making ordinance as confiscatory upon the conclusion that it allowed a return of six per cent per annum, on the valuation of the plant, although the Master expressed the opinion that the corporation ought to earn eight per cent, where, as in this case, the ordinance was attacked before opportunity to test its results by actual experience.

Ordinarily, time alone can satisfactorily demonstrate whether a rate fixed by ordinance is or is not confiscatory so as to amount to a taking of property without due process of law within the meaning of the

Fourteenth Amendment, and in this case there should be an actual application of the rates.

Following the rule laid down in *Knoxville* v. *Water Co.*, 212 U. S. 1, and *Willcox* v. *Gas Co.*, 212 U. S. 19, the bill seeking to enjoin the putting of the ordinance involved in this case into effect should be dismissed without prejudice to the right of complainant to reinstate the case after a reasonable period for an actual demonstration of the effect of the ordinance.

199 Fed. Rep. 204, modified and affirmed.

THE facts, which involve the validity under the impairment of obligation provision of, and the due process clause of the Fourteenth Amendment to, the Federal Constitution of an ordinance of the City of Des Moines fixing ninety cents as the price of gas in that city, are stated in the opinion.

Mr. Nathaniel T. Guernsey, with whom *Mr. George H. Carr* was on the brief, for appellant:

At the time in question the City of Des Moines had the power to establish reasonable rates to be charged by appellant for gas sold and distributed in the city. Code of Iowa, 1897, Supp., §§ 724, 725.

Rates so established must be sufficient to afford to the appellant a fair return upon the value of its property, *i. e.*, a return relatively equal to what money devoted to other like investments will earn. *Minnesota Rate Cases*, 230 U. S. 352, 434; *Smyth* v. *Ames*, 171 U. S. 361; *San Diego Land Co.* v. *National City*, 174 U. S. 739; *San Diego Land Co.* v. *Jasper*, 189 U. S. 439; *Stanislaus County* v. *San Joaquin Co.*, 192 U. S. 201; *Knoxville* v. *Water Co.*, 212 U. S. 1; *Willcox* v. *Gas Co.*, 212 U. S. 19.

The value to be ascertained is the fair value of the property used in performing the public service.

Appellant was bound to establish each ultimate fact necessary to sustain a decree in its favor by clear and satisfactory evidence, but not beyond reasonable doubt.

Depreciated cost of reproduction should not have been deducted. *Willcox* v. *Gas Co.*, 212 U. S. 19; *S. C.*, below,

157 Fed. Rep. 849; *Omaha* v. *Water Co.*, 218 U. S. 180; *Steenerson* v. *Great Northern Ry.*, 69 Minnesota, 353; *State* v. *Minn. & St. L. R. R.*, 80 Minnesota, 191; *Cotting* v. *Kansas City Stock Yards*, 82 Fed. Rep. 850, 854; *Kings County Lighting Co.* v. *Willcox*, 156 App. Div. (N. Y.) 603.

Cedar Rapids Gas Co. v. *Cedar Rapids*, 144 Iowa, 426, does not hold the contrary.

The court erred in its conclusion that the total of $2,240,928 was stated by the master as the value of the plant, and in the conclusion that this included the item of $300,000 on account of going value.

The item of going value is an element contributing to the value of each tangible part. *Omaha* v. *Water Co.*, 218 U. S. 180.

The *Cedar Rapids Case, supra*, did not hold that this item should be disallowed.

Going value is an element in the value of such a property. *National Water Works* v. *Kansas City*, 62 Fed. Rep. 853; *Omaha* v. *Water Co.*, 218 U. S. 180; *Public Service Gas Co.* v. *Utility Commissioners*, 87 Atl. Rep. 651; *Kings County Lighting Co.* v. *Willcox*, 156 App. Div. (N. Y.) 603; *Monongahela Water Case*, 223 Pa. St. 323; *Appleton Water Works* v. *Wisconsin*, 142 N. W. Rep. 476; *Gloucester Water Co.* v. *Gloucester*, 179 Massachusetts, 365; *Norwich Gas Co.* v. *Norwich*, 76 Connecticut, 565; *Spring Valley Water Works* v. *San Francisco*, 124 Fed. Rep. 574; *S. C.*, 165 Fed. Rep. 657; and 192 Fed. Rep. 137; *Kennebec Water District* v. *Waterville*, 97 Maine, 185; *Water Co.* v. *Galena*, 74 Kansas, 644; *Bristol* v. *Water Works*, 23 R. I. 274; *Water Co.* v. *Newburyport*, 168 Massachusetts, 541; *Venner* v. *Urbana Water Co.*, 174 Fed. Rep. 348; *Bonbright* v. *Geary*, 210 Fed. Rep. 44.

The rule is the same in rate cases and condemnation cases. *Omaha* v. *Water Co.*, 218 U. S. 203.

The word "property" describing what is protected in condemnation cases involving the Fifth Amendment, and

in confiscation cases involving the Fourteenth Amendment, means the same thing in each Amendment. *Willcox* v. *Gas Co.*, 212 U. S. 19; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *Fairbanks* v. *United States*, 181 U. S. 283; *Minnesota Rate Cases*, 230 U. S. 352.

As to what is a fair return and for the distinction between a reasonable rate and a fair return, see *Public Service Gas Co.* v. *Utility Commissioners*, 87 Atl. Rep. 651.

It will vary under varying conditions. *Willcox* v. *Gas Co.*, 212 U. S. 19, 48.

What it is, is a question of fact, to be determined by the testimony in each case. *Gas Light Co.* v. *Cedar Rapids*, 144 Iowa, 426, 448.

Under the rule in the *Consolidated Gas Case*, 8% was justified by the evidence in this case. A public utility must constantly increase its investment and must pay for the new money required whatever such money is worth in the market.

Upon the facts found, the complainant was entitled to a decree in its favor.

In making his estimates, the master took into account normal increase in its sales, while the history of the plant demonstrates that increases in sales in amounts sufficient to earn a fair return would have been impossible.

To sell gas there must be persons to buy it.

The population was insufficient to afford a market for the gas necessary to earn a fair return.

The plant had not the capacity to manufacture enough gas to afford a fair return.

A large additional investment would have been required, increasing the amount upon which the return must be earned

Computations predicated upon the facts found by the Master demonstrate that upon no reasonable hypothesis could a fair return be anticipated.

The clear and satisfactory evidence rule simply requires

that where facts have been established by testimony of this character, the rule may not be invoked to discredit sound and legitimate inferences from them. These facts may be established without evidence deduced from a trial of the rates. *Willcox* v. *Gas Co.*, 212 U. S. 19; *Gas Co.* v. *Lincoln*, 223 U. S. 349.

The court erred in dismissing the bill upon the merits and then in attempting to provide for a reopening of the case after three years. *Bronson* v. *Schulten*, 104 U. S. 410.

So far as the appellant is concerned if it is not entitled to a decree in its favor upon the merits, it is entitled to an opportunity to try the rates and to definitely establish the facts upon which the rights of the parties depend. *Stanislaus County* v. *San Joaquin*, 192 U. S. 201; *Knoxville* v. *Water Co.*, 212 U. S. 1; *Willcox* v. *Gas Co.*, 212 U. S. 19; *Gas Co.* v. *Cedar Rapids*, 223 U. S. 655; *Minnesota Rate Cases*, 230 U. S. 352; *Missouri Rate Cases*, 230 U. S. 474; *In re Louisville*, 231 U. S. 639; *Louisville* v. *Cumberland Tel. Co.*, 231 U. S. 652; *Nor. Pac. Ry.* v. *North Dakota*, 216 U. S. 579.

Mr. H. W. Byers, with whom *Mr. R. O. Brennan* and *Mr. Eskil C. Carlson* were on the brief, for appellee.

Mr. Justice Day delivered the opinion of the court.

This suit was begun in the District Court of the United States for the Southern District of Iowa, by the present appellant, hereinafter called the Gas Company, against the City of Des Moines and others, to enjoin the enforcement of the provisions of a certain ordinance of the City, passed December 27, 1910, whereby, from and after the first day of January, 1911, the rate to be charged and collected for gas in the City of Des Moines was fixed at ninety cents for each thousand cubic feet. The allegations of the bill were that to enforce the ordinance would amount

to the taking of the Gas Company's property without just compensation and operate as confiscation of its property, and thereby deprive it of the same without due process of law, and would deny the equal protection of the laws; further, that it would impair the existing contract between the Gas Company and the City, and between the Gas Company and the State of Iowa, growing out of its incorporation under the statutes of the State and of the ordinances of the City, giving rights to the Gas Company to lay its mains and supply gas to the residents of the City. A temporary injunction was allowed, and after issue made, the case was referred to Robert Sloan, Esquire, as Special Master in chancery to report his findings of fact and conclusions of law. The Master afterwards filed his report, and the same coming on before the District Court for hearing, upon exceptions, the report of the Master was confirmed, and the bill dismissed "with prejudice" (199 Fed. Rep. 204). From that decree the present appeal is taken.

The Master's report, as court and counsel agree, gives evidence of a very thorough consideration of the subject, and the facts found are accepted by the appellant. From the report we learn that the plant belonging to the Gas Company dates back to the year 1864; that it was owned and operated by the Capital City Gas Light Company until March 1st, 1906, when the present company was organized and the property, real and personal, of the Capital City Company conveyed to it; that The United Gas Improvement Company, of Philadelphia, became the owner of the entire stock of the Capital City Company on June 1st, 1886; that the capital stock then consisted of 3,000 shares of the par value of one hundred dollars each, and that subsequently the capital stock was increased to 6,000 shares of the same value each; that the growth of the City of Des Moines increased the demand for gas, and many extensions were added. In making these improvements

and extensions, the Capital City Gas Light Company became indebted to The United Gas Improvement Company for cash advanced, and otherwise, to the amount of $105,526.49, and also for gas holder $103,958 and the United Gas Improvement Company also owned $400,000 of bonds secured by mortgage on the plant of the Capital City Company. On March 1st, 1906, the Capital City Company transferred and conveyed its property to the present Gas Company, the authorized capital stock of the new company being 22,500 shares of the par value of $100 each. At the time of this transfer, the new company executed to The United Gas Improvement Company $800,000 stock contracts bearing 6 per cent. interest until paid, and also authorized and executed to the Commercial Trust Company, of Philadelphia, Pa., a deed of trust to all property of the Des Moines Gas Company, transferred to it as aforesaid to secure the payment of $1,500,000 5 per cent. gold bonds payable semi-annually, which were to be issued as provided by said mortgage. The sum of $240,000 bonds were issued at the date of execution of the mortgage, one-half thereof used in payment of the debt due The United Gas Improvement Company for the gas holder, and the other half to pay the amount due on account to that company. On January 1st, 1907, there were also issued $400,000 of these bonds to pay the bonds then due of the Capital City Company. When the transfer was made $45,000 was issued to pay for the Valley Junction property. This is a town adjacent to Des Moines, and something like six miles from the gas works of the Gas Company, to which the gas is transmitted by high pressure mains through the city, by a distribution system therein. There is nothing in the record to show the value of the Valley Junction property, except that of a high pressure main, which is also used in distributing gas in the city. Extensions and improvements have been made to the works and distribution system since the date of

transfer up to the first day of January, 1911, to the amount of $412,704.51, and, as provided by the mortgage, bonds have been issued by the trustee to the amount of $1,097,000, and these bonds have all been purchased by The United Gas Improvement Company. The total discount on these bonds is $33,950; $267,000 discounted at 10 per cent. and the balance, $145,000, at 5 per cent. No dividends have been declared by the present company upon its stock, but the interest upon the stock contracts and bonds has been regularly paid, and $389,000 has been paid on the principal of the stock contracts, leaving January 1, 1911, only $411,000 unpaid. These payments have been made out of the profits derived from the operation of the plant. The officers of the Gas Company are elected by the United Gas Improvement Company, who own and control all the stock, and these officers are also, in the main, the officers of the United Gas Improvement Company, and the latter controls the Gas Company and its business.

Various ordinances have been passed, regulating the price of gas, from which the Master finds as follows:

"1. That for the years 1896 and 7 the price of gas should be $1.30 per M. C. F. net; for the years 1898 and 9, $1.25 net; for the years 1900 and 1, $1.20 net; for the years 1902, 3 and 4, $1.15 net; and for the year 1905, $1.10 net; and for the years 1906 to 1910, $1.00 net with the proviso that it may add 10 cents per M. C. F. to each of these prices but shall be required to discount that sum for the payment by or before the 15th day of the month following that in which the gas was consumed.

"2. That the City pay for the term of fifteen years for each street lamp, $18.00 per year, until they should reach 500, when it should be reduced to $17.00 for each lamp.

"3. That its gas should not be less than 22 candle power."

There is no question of the authority of the City of

Des Moines, under the laws of the State, to regulate the rates at which gas shall be furnished to the City of Des Moines and its inhabitants. After valuing the real estate and various items of personal property as hereinafter stated, the Master adopted as the only practical way in his judgment of determining the reasonable value of the buildings, their contents, the yard structures and the mains, house and street lamp services and meters, the process of estimating the cost of reproducing them new, and then estimating the depreciation which should be deducted, in order to obtain their present value. Under this method, the Master summed up the value of the property of the Gas Company as follows:

"The new ordinance deprives the complainant of the right to add ten cents per M. C. F. to the price of gas, unless paid on or before the 15th day of the month following that in which the gas was consumed, and the evidence shows that the average working capital for the past five years was $120,000, and that when the ordinance went into effect, that they were then using $142,000 as working capital.

"Without the means of enforcing prompt payment, and without any inducement so to do, on the part of their customers, in my judgment the working capital should not be diminished, and the amount allowed is . . . $ 140,000

To this add real estate	150,000
To organization expenses	6,923
To meters in stock	6,603
Present value of physical property aside from above items	1,937,402
"Total physical value	$2,240,928"

What is called in this summary "the present value of physical property," the report shows was arrived at by the Master in the manner following: He first found what he thought was the base value of the property, i. e., "what

it would cost to produce it at the present time new, without adding thereto any overhead charges." This figure he fixed at $1,975,026. To this he added overhead charges, fifteen per cent.,—$296,254. From this he deducted depreciation, $333,878, leaving as the value of the property thus ascertained, $1,937,402.

As appears from the opinion of the court and the arguments of counsel in this case, exceptions to the Master's report so far as the Gas Company is concerned pertain principally to two questions: One as to his manner of dealing with what is termed the "going value" of the concern, and the other as to the addition of the sum of $140,000 to the valuation, because appellant insists, upon the plan of valuation by cost of reproduction less depreciation, it would cost that sum to take up and replace pavements not laid when the mains were put in but necessary to be removed and replaced in the reproduction thereof.

Before considering the correctness of the rulings of the Master and their confirmation by the District Court, it is proper to notice that there is considerable difference between counsel as to what the Master actually found, as to whether he included the sum of $300,000 which he was disposed to allow for going value in the $2,240,000 valuation found by him, or whether it was added to the estimate of the value of the property already made by him.

We think the Master intended to value the property at $2,240,000 exclusive of the $300,000 which, as we have said, he was at first disposed to allow for going value, and also that he deducted, in reaching the $2,100,000 the $140,000 claimed by the Gas Company as a proper allowance because of the cost of removing and replacing pavements, as above stated. We think too, that it was the Master's conclusion that, if the $300,000, which he was at first disposed to allow, as stated, or the $140,000 for paving, were included, the valuation of the plant would be such that a fair return could not be made upon the value

of the property, and therefore the Company would be entitled to a decree in its favor. It therefore follows that the determination of the correctness of the decree below, confirming the Master's report, depends upon and requires a consideration of these two items.

We may premise that the public authority is presumed to have acted fairly, and that the burden of proof is upon the Gas Company to show that the regulating ordinance has the effect to deprive it of an income equivalent to a fair return upon its property dedicated to public use. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1.

As we have said, the Master was at first disposed to allow $300,000 as a separate item covering the going value of the concern. After stating that he fixed the going value at the sum of $300,000 he says:

"It may be asked on what basis this amount is determined. The evidence followed strictly might require me to make it higher, could my mind rest satisfied that the 'Going Value' of this concern is worth more, but I cannot feel satisfied that such is the case, and regard $300,000 as every dollar it is worth over and above its physical value, and in my judgment, it is worth that much more than a plant would be that had to develop its business. But that would be much more rapid, in my judgment, than is estimated. I think a purchaser would be willing to add this amount for its developed business, and that a seller would not be willing to sell unless he got that much more than its physical value, but I could not give the mental process by which this conclusion is reached any more than a jury could do so, under like circumstances, but it is nevertheless my judgment under all the evidence in the case.

"The element of 'Good Will' as applied to the ordinary merchant or manufacturer dealing with the public generally is not considered in estimating the 'Going Value' of Complainant's plant. It cannot be considered in a

public utility like the one in question in this case, because the Complainant has a monopoly of the business in which it is engaged in the City of Des Moines, and those who desire to use its product must buy of it. They have no choice in the matter. But there is a great difference even in a monopoly which has a business already developed and one that must develop it. The plant of Complainant has all its parts working in harmony, performing their several functions in producing and conveying the gas to its customers. These several parts are not only in place, but have been brought to a harmonious operation throughout. Even the employés of the concern are familiar with their duties and experienced in performing them. But without business no matter how perfect it may be, it would be unprofitable. It is ready, however, for business, and has the business to transact. It was a small concern at the start in 1864, but its books show that it has had a steady growth for many years in the past, and everything indicates that it will continue in the future. There is great difference between such a plant and one whose business must be developed. All a purchaser of such a plant would have to do would be to take charge of the plant, 'Touch the button,' and he is making money from the start. There is no element of uncertainty connected with it.

"He can retain its experienced employés as a rule, should he so desire, at the same wages. There is no question that such a plant has a 'Going Value,' because it is a money maker from the start.

"The only difficulty is to determine how much its 'going value' is worth. No interest during its construction is allowed, nor anything that is included in the 'Overhead Charges,' which are part of the physical value. But simply the fact that it has a developed business that will make money for its owner, with reasonable rates allowed for the product which it manufactures and sells."

That "good will," in the sense in which that term is

generally used as indicating that element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business, has no place in the fixing of valuation for the purpose of rate-making of public service corporations of this character, was established in *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 52. "Going value," or "going concern value," i. e., the value which inheres in a plant where its business is established, as distinguished from one which has yet to establish its business has been the subject of much discussion in rate-making cases before the courts and commissions. Many of those cases are collected in Whitten on "Valuation of Public Service Corporations," §§ 550–569, and the supplement to the same work, §§ 1350–1385. That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use. Each case must be controlled by its own circumstances, and the actual question here is: In view of the facts found, and the method of valuation used by him, did the Master sufficiently include this element in determining the value of the property of this Company for rate-making purposes?

Included in going value as usually reckoned is the investment necessary to organizing and establishing the business which is not embraced in the value of its actual physical property. In this case, what may be called the inception cost of the enterprise entering into the establishing of a going concern had long since been incurred. The present company and its predecessors had long carried on business in the City of Des Moines, under other ordinances, and at higher rates than the ordinance in question established.

For aught that appears in this record, these expenses may have been already compensated in rates charged and collected under former ordinances. As we have said, every presumption is in favor of the legitimate exercise of the rate-making power, and it is not to be presumed, without proof, that a Company is under the necessity of making up losses and expenditures incidental to the experimental stage of its business.

These items of expense in development are often called overhead charges, for which, as we have already seen, the Master allowed fifteen per cent. upon the base value (exclusive of real estate), or $296,254, in addition to his allowance of $6,923 for organization expenses. Of these charges the Master said:

"In reaching the physical value of the plant in question by the process of reproduction, it is necessary to bear in mind that the present value thereof represents much more than the machinery therein, the labor of installing and constructing them, and putting them in place to perform their various functions, ready for the manufacture and distribution of gas to its customers. Were the City of Des Moines without such a plant, and such a one as the Complainant now owns was proposed, it would be found that much more than the mere cost of labor and material would be expended. Such expenditures are termed overhead charges, and are as follows:

"1. Time and money expended in the promotion of the enterprise, in the organization of the company and interesting capital therein, including, also, legal expenses, obtaining the necessary franchise, as well as the costs of incorporating the company.

"2. Then a competent engineer must be employed to prepare the plans and specifications for the plant, and make the necessary surveys, and when the work began, to superintend the construction thereof, and see that it is done properly and according to plans and specifications.

The successful operation of the plant depends largely upon its proper construction.

"3. Then losses arising from accidents and injuries to workmen as well as the material during its construction, which is such an amount as the cost of insuring against such losses, which is between 1 and 2 per cent.

"4. Contingencies are such expenditures as arise from the lack of foresight and care in preparing the plans and specifications. No matter how careful the engineer may prepare them, such expenditures invariably arise. Mr. Alvord testified that his allowance therefor would depend very much upon his knowledge of the engineer who prepared them, but that no matter who prepared them, they would invariably occur, and an allowance should be made therefor. The careful and thorough inventory in this case reduces very greatly the allowance therefor.

"5. The cost of administration, which includes the time and money expended by the parties who are engaged in the enterprise, purchasing the material, procuring the money for their payment as needed, and generally superintending the entire enterprise during the construction of the plant.

"6. It is estimated that it would take three years to complete the plant in question, and that at least one-half the time and money invested therein would give no return, and that a loss of interest would result therefrom and that such loss would be included in the overhead charges.

"7. Taxes during the construction.

"The latter is regarded by me as very questionable. It is in a certain sense making taxes an asset rather than a liability, and the amount is so vague and uncertain that it has been given very little consideration and weight in fixing the overhead charges. Either the money or the property should pay taxes.

"It must be borne in mind that these expenditures are all made during the promotion and construction of the

plant, and are necessarily a part of the cost thereof. No overhead charges that do not inhere in and add to the cost thereof, should be allowed as a part of its physical value. It is not a question of what was actually expended therefor in the plant in question, but what would it cost to reproduce a similar plant at the present time. It is through this method we reach the present value of this plant new, and then when it is properly depreciated, according to the condition, life and age of its various parts, we reach the present value of the plant in its present condition. It is not a perfect method, but it is the best method therefor, and results as nearly as possible in giving the present value of the plant. No other method known has proved so satisfactory."

The matter of going value was alluded to in *Knoxville* v. *Water Co.*, 212 U. S. 1. In that case, $10,000 was allowed for organization, promotion, etc., and $60,000 for "going concern." Of the latter item this court said (page 9): "The latter sum we understand to be an expression of the added value of the plant as a whole over the sum of the values of its component parts, which is attached to it because it is in active and successful operation and earning a return. We express no opinion as to the propriety of including these two items in the valuation of the plant, for the purpose for which it is valued in this case, but leave that question to be considered when it necessarily arises. We assume, without deciding, that these items were properly added in this case."

The question was presented in *Gas Co.* v. *Cedar Rapids*, 223 U. S. 655. That case was a writ of error to a judgment of the Supreme Court of Iowa, holding valid a certain ordinance regulating the price of gas in Cedar Rapids (144 Iowa, 426), and the judgment of the Iowa court was affirmed. Dealing with the question of "going value," the Iowa Supreme Court said:

"Also the sum of $100,000 was included by these wit-

nesses as enhancement of value by reason of being a 'going concern.' As previously intimated, the value of the plant is to be estimated in its entirety, rather than by the addition of estimates on its component parts, though the latter course will materially aid in determining the value. Advantages have accrued through the sagacity of its management as contended by appellant. So, too, there are the inevitable mistakes which would not be likely in the construction of a new plant; but to put a new plant in profitable operation time would be required, and, aside from the intangible element of good will, the fact that the plant is in successful operation constitutes an element of value.

"As said, the value of the system as completed, earning a present income, is the criterion. In so far as influenced by income, however, the computation necessarily must be made on the basis of reasonable charges, for whatever is exacted for a public service in excess of this is to be regarded as unlawful.

"Save as above indicated, the element of value designated a 'going concern' is but another name for 'good will,' which is not to be taken into account in a case like this, where the company is granted a monopoly. *Water Company* v. *Cedar Rapids*, 118 Iowa, 234; *Willcox* v. *Consolidated Gas Co.*, 29 Sup. Ct. 192. The witnesses for plaintiff took into account 'good will' in giving their opinion of the enhancement in value because of being a going concern, and we have no means of separating these so as to ascertain their estimate of the separate advantage of completion so as to earn a present income."

Dealing with the assignment of error which attacked the correctness of the ruling of the Iowa court upon this point, this court said (page 669):

"Then again, although it is argued that the court excluded 'going value,' the court expressly took into account the fact that the plant was in successful operation. What

it excluded was the good will or advantage incident to the possession of a monopoly, so far as that might be supposed to give the plaintiff the power to charge more than a reasonable price. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 52. An adjustment of this sort under a power to regulate rates has to steer between Scylla and Charybdis. On the one side if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the Fourteenth Amendment, then the power to regulate is null. On the other hand, if the power to regulate withdraws the protection of the Amendment altogether, then the property is naught. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit."

As we have already said, the Master, while at first disposed to allow the additional sum of $300,000 for "going value" as a separate item, after the decision of this court in the *Cedar Rapids Case* seems to have reached a different conclusion, for he said of that case:

". . . it also renders it extremely doubtful that 'Going Value' will be included in the valuation of such a plant as the basis of return, beyond the fact that it is in 'successful operation.' That would exclude the sum of $300,000 estimated in this case, on the grounds that when the ordinance was enacted, it already possessed a well developed and paying business.

"In my judgment, after considering the able and thorough arguments of counsel, that it is decisive of the question, and holds that 'going value' should not be considered in determining the basis upon which the complainant is entitled to have its return reckoned, and feel that it is my duty to so state.

"The physical value as hereinbefore determined, is reckoned upon the fact that the plant was in 'successful operation' when the ordinance was enacted, otherwise its

value would be much less. The 'going value' is that enhancement which results from a well developed and paying business. This would result in reducing the estimated deficit for each year $24,000, and yield a return to the Complainant of, at least, 6 per cent. on $2,100,000.

"While this case is close to the border line, I cannot say on the whole case that the evidence beyond any just and fair doubt, satisfies me that the rates will prove confiscatory, should the ordinance be put into effect and an actual test thereof be made."

While there is a difference between court and counsel as to what the Master meant by this, we think it is apparent that he meant to say that, applying the rule of the *Cedar Rapids Case*, he had already valued the property in the estimate of what he called its physical value, upon the basis of a plant in actual and successful operation; for he said that otherwise its value would be much less.

As pointed out in the *Cedar Rapids Case*, if return is to be regarded beyond that compensation which a public service corporation is entitled to earn upon the fair value of its property, the right to regulate is of no moment, and income to which the corporation is not entitled would become the basis of valuation in determining the rights of the public. When, as here, a long established and successful plant of this character is valued for rate-making purposes, and the value of the property fixed as the Master certifies upon the basis of a plant in successful operation, and overhead charges have been allowed for the items and in the sums already stated, it cannot be said, in view of the facts in this case, that the element of going value has not been given the consideration it deserves and the appellant's contention in this behalf is not sustained.

As to the item of $140,000, which, it is contended, should be added to the valuation, because of the fact that the Master valued the property on the basis of the cost of reproduction new, less depreciation, and it would be

necessary in such reproduction to take up and replace pavements on streets which were unpaved when the gas mains were laid, in order to replace the mains, we are of opinion that the court below correctly disposed of this question. These pavements were already in place. It may be conceded that they would require removal at the time when it became necessary to reproduce the plant in this respect. The Master reached the conclusion that the life of the mains would not be enhanced by the necessity of removing the pavements, and that the Company had no right of property in the pavements thus dealt with, and that there was neither justice nor equity in requiring the people who had been at the expense of paving the streets to pay an additional sum for gas because the plant, when put in, would have to be at the expense of taking up and replacing the pavements in building the same. He held that such added value was wholly theoretical, when no benefit was derived therefrom. We find no error in this disposition of the question.

Nor do we think there was error in refusing an injunction upon the conclusion reached that a return of 6 per cent. per annum on the valuation would not be confiscatory. This is especially true in view of the fact that the ordinance was attacked before there was opportunity to test its results by actual experience. It is true the Master reported that in his opinion the Company ought to earn 8 per cent., but he also found that in his judgment gas could be produced for 60 cents per thousand, and the actual effect of the 90 cent rate on an economically managed plant had not had the test of experience.

The decree of the court below is peculiar in that it directs the dismissal of the bill "with prejudice," and adds, "At any time on and after three years from this date complainant, its successor or assigns, may on motion reinstate this case with all the pleadings and evidence now on file, with the same and like effect as though filed for such sub-

sequent hearing. And each party may then file such additional pleadings and take and file such additional evidence as to each party may be deemed advisable."

While we agree with the court below that it was right to confirm the Master's report and dismiss the bill, we think, in view of the fact that the attack upon the rates was made before the ordinance went into effect, and before actual application of the rates could demonstrate whether they were remunerative or not, that the court should have followed the recommendation of the Master and dismissed the bill without prejudice. We think this is particularly so, in view of the fact that ordinarily time alone can satisfactorily demonstrate in a case like this whether or not the rates established will prove so unremunerative as to be confiscatory in the sense in which that term has been defined in rate making cases. The Master's suggestion has the support of the judgment of this court in *Knoxville* v. *Water Co.*, 212 U. S. 1, and *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19.

With the modification that the bill be dismissed without prejudice, instead of, as the court below directed, with prejudice, the decree is affirmed, with costs.

Affirmed.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY *v.* RAILROAD COMMISSION OF WISCONSIN.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 233. Argued April 20, 21, 1915.—Decided June 14, 1915.

Where the fixing of rates does not impair the obligation of contracts, the exercise by a municipality of a lawful power to fix rates does not deprive the public utility company of its property without due process of law where it does not appear that the rates fixed are confiscatory.

The fixing of rates, which may be charged by public service corporations—in this case a street car corporation—is a legislative function of the State.

While the State may enter into contracts preventing it for given periods from exercising the function of rate making, such a renunciation must be so clear and unequivocal as to permit no doubt of its construction. *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265.

While it is the duty of this court to determine for itself whether there was a contract and the extent of a binding obligation, and the parties are not concluded by the decision of the state court, in so determining this court gives much consideration to the decisions of the state court construing the statutes of the State under which the contract is alleged to have been created.

In this case, as this court cannot say that the state statute involved in this action unequivocally grants to municipalities the power to deprive the legislature of the right to exercise the rate-making function in the future, and as the state court in other cases has held that the statute did not indicate an intention to surrender such right, this court affirms the judgment of the state court, holding that no irrevocable contract was created by an ordinance establishing rates of fare of a street car company, notwithstanding that a majority of the members of the highest court of the State did not concur in that view in this case.

153 Wisconsin, 502, affirmed.

THE facts, which involve the constitutionality under the impairment of obligation clause of the Federal Constitu-

tion and the due process clause of the Fourteenth Amendment of an order of the Wisconsin State Railroad Commission establishing fares upon the system of the plaintiff in error, are stated in the opinion.

Mr. Henry H. Pierce and *Mr. Edwin S. Mack*, with whom *Mr. George P. Miller*, *Mr. Arthur W. Fairchild* and *Mr. William J. Curtis* were on the brief, for plaintiff in error:

This court will determine for itself the existence or non-existence of the contract and whether the state law complained of impairs its obligation.

Where the effect of a change in decision detrimentally affects contract rights, such rights will be determined by the law as it existed when they accrued.

A State may not impair the obligation of its contracts.

The grant of a right to use the streets for railway purposes is a valuable property right.

The State may authorize a municipal corporation to make an inviolable contract fixing rates to be charged by a public utility.

The ordinance and its acceptance constitute, and were intended to constitute, a contract between the State and the Company definitely fixing rates during the term of the franchise. The State had authorized the City to make the contract. The State has reserved no power to amend, alter or repeal the contract.

The order of the Commission violates the due process clause, even if there were no question of contract.

Numerous authorities of this and other courts sustain these contentions.

Mr. Walter Drew, Deputy Attorney General of the State of Wisconsin, with whom *Mr. W. C. Owen*, Attorney General of the State of Wisconsin, and *Mr. Lester C. Manson* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This suit originated in the Circuit Court of Dane County, Wisconsin, and was brought by the Milwaukee Electric Railway and Light Company against the Railroad Commission of Wisconsin. The plaintiff, a street railway company, organized under the laws of Wisconsin, and authorized to conduct a street railway business in the City of Milwaukee, sought to enjoin the Railroad Commission, organized under the laws of that State of 1905, from enforcing a certain order against the Company, whereby the right of the Railway Company to charge fares upon its railway system had been reduced below what it was contended had been previously fixed by an ordinance of the City of Milwaukee, which, it was alleged, upon acceptance, constituted an irrevocable contract between the Company and the City. In the allegations of the complaint it appears that on January 2, 1900, there was granted to the plaintiff the right to operate over certain streets, and in the ordinances of that date all franchises expiring prior to December 31, 1934, were extended to that date, and all franchises which would otherwise expire subsequently to that date were made to terminate at that time.

Section 6 of the ordinance provides:

"After the passage, publication and acceptance of this ordinance by said railway company, the rate of fare for one continuous passage upon the lines of railway within said city limits of said city owned and operated by said railway company constructed under any franchise herein, heretofore or hereafter granted to said railway company or its predecessors, successors or assigns, as the case may be, shall be not to exceed five cents for a single fare, except for children under ten years of age the rate of fare shall be three cents for one child and five cents for two children, and infants under three years of age free. Except where cars or carriages shall be chartered at a special price, which

fare shall entitle each passenger, upon demand made at the time of payment of fare, to one transfer at established points of transfer to any connecting or cross line of said railway company, for passage within said city, and convenient points of transfer shall be maintained and such additional points of transfer established as will carry out the full intent and purpose of this ordinance to maintain and extend the transfer system now in force upon the lines of said railway company at the present standard of convenience for the people of said city. Each transfer ticket, shall be good only for the passenger to whom it is issued, and for a continuous trip in the direction specified upon the transfer so given, and upon the first car leaving the transfer intersection after the time designated on such transfer.

"Provided, however, that after the acceptance of the terms of this ordinance the railway company shall, on demand made at its office in said city, or to the conductors on its cars operated on its lines within the corporate limits of said city, sell tickets in packages of twenty-five for one dollar or six for twenty-five cents, each of which tickets shall entitle the holder thereof to use the same upon the cars of said railway company only between the hours of 5:30 o'clock and 8 o'clock in the morning and between the hours of 5 o'clock and 7 o'clock central standard time, in the afternoon of each day until January 1, 1905, and shall also entitle the holder to the same privileges as are or may be accorded to passengers paying a cash fare of five cents; and the said railway company shall, from and after January 1, 1905, continue the sale of tickets in packages at the price aforesaid until December 31, 1934, each to be good at all hours of the day, with the same privileges as are or may be accorded to passengers paying a single cash fare of five cents."

The bill sets out the acceptance of this ordinance, and thereby it is claimed the Company obtained the right to

charge, until December 31, 1934, a cash fare of five cents, and to sell tickets in packages of twenty-five for one dollar or six for twenty-five cents, each of which tickets should entitle the holder to use the same upon the cars between the hours mentioned in the ordinance, and to have the privileges accorded to passengers paying five cents fare. In November, 1906, the City of Milwaukee filed a complaint with the defendant Railroad Commission for a reduction of rates of fare, and filed a similar complaint May 13th, 1908. This proceeding resulted in the order complained of, which did not interfere with the cash fare prescribed, but provided that the Company should discontinue its rate of twenty-five tickets for one dollar, and should sell tickets in packages of thirteen for fifty cents, which tickets were ordered to be accepted in payment of fare. It is alleged that this action of the Railroad Commission impairs the obligation of the contract between the City and the Company, and takes the plaintiff's property without due process of law, in violation of § 10 of Article I of the Constitution of the United States and of the Fourteenth Amendment thereto.

On the hearing in the court of first instance, it was held that there was no contract made by the passage and acceptance of the ordinance which we have quoted, and the complaint was accordingly dismissed. Upon appeal to the Supreme Court of Wisconsin that judgment was affirmed, 153 Wisconsin, 592. The case was heard before six judges of that court. Three held that the statute upon which the plaintiff relied as conferring authority upon a municipal corporation to make the contract in question did not authorize the making of a contract which would prevent the future exercise of the authority of the State to regulate the rates of fare by legislative action. A fourth judge expressed no view upon this phase of the case, specifically holding that under the Wisconsin constitution there was no power to delegate to municipal corporations an author-

ity to make irrepealable contracts respecting rates. Two of the judges dissented upon the ground that there was an irrepealable contract, valid and binding between the Company and the City, which was violated by the subsequent legislation creating and empowering the Railroad Commission, and because of the action of that body in reducing the rate of fare.

In the view we take of the case it is unnecessary to pass upon the question whether the ordinance had the effect to make a contract binding between the City and the Company until subsequent legislative action by the State, or to decide whether the grant of the rights and privileges as to fares was, under the Wisconsin constitution, revocable at the will of the legislature.

Section 1862 of the Revised Statutes of 1860 provides:

"Section 1862. Corporations for constructing, maintaining and operating street railways may be formed under Chapter 86, and shall have powers and be governed accordingly. Any municipal corporation or county may grant to any such corporation, under whatever law formed, or to any person who has the right to construct, maintain and operate street railways the use, upon such terms as the proper authorities shall determine, of any streets, parkways, or bridges within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of freight and passengers, to be propelled by animals or such other power as shall be agreed on, with all necessary curves, turnouts, switches and other conveniences. Every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may by ordinance, from time to time, prescribe. Any such grants heretofore made shall not be invalid by reason of any want of power in such municipal corporation to grant, or any such rail-

way corporation or person to take the same; but in such respects are hereby confirmed."

The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the State, and while the right to make contracts which shall prevent the State during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases in which the doctrine has been affirmed. The principle involved was well stated by Mr. Justice Moody in *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, 273:

"The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the State) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality, or of any other political subdivision of the State are not sufficient. Specific authority for that purpose is required."

The Chief Justice of Wisconsin, who delivered the opinion in which two other judges concurred, did not call in question the right of the City to make a contract with a public utility corporation, fixing the rates to be charged for a definite period, which would bind the City itself, but placed his decision upon the ground that the section in question gave no distinct authority to the City to contract away the legislative authority of the State to fix tolls

and fares, by lowering them if found to be excessive; that while the term "grant" was used, he held the grant was to be upon terms such as the municipal authorities might determine, and that this language was more appropriate to the exercise of power by the municipality than to the making of a contract between parties. The language of the section certainly lends itself to this construction, and there is nothing in specific terms conferring the right to contract by agreement between parties, much less to make such contract during its existence exclusive of any further right of the State to act upon the subject in the exercise of its legislative authority. It authorizes the grant of the use of the streets upon such terms as the proper authorities shall determine, not upon such terms as the parties in interest shall agree to.

Among cases in this court specially relied upon by the plaintiff in error is *Detroit* v. *Detroit Citizens' Street Ry.*, 184 U. S. 368. It was therein held, quoting constructions of the Supreme Court of Michigan, that the legislation involved authorized the making of a contract between the City and the Street Railway Company, which the City undertook to abrogate by subsequent ordinances; and the fact that the legislature had not attempted to interfere with the rights of the Street Railway Company in Detroit was stated, and the extent of its power to interfere with the rights of the Street Railway Company expressly held not to be involved in the case. In another case relied upon by plaintiff in error, *Cleveland* v. *Cleveland City Ry.*, 194 U. S. 517, it was specifically stated (p. 534) that the courts of Ohio had held that the acceptance of ordinances of the character in question constituted a binding contract, and the Ohio statute was set forth and held to expressly authorize a binding contract for the period covered by the statute. In the case of *Minneapolis* v. *Minneapolis Street Ry.*, 215 U. S. 417, the ordinance which was held to constitute a binding contract for the rates of fare pre-

scribed therein, was specifically validated by an act of the legislature of Minnesota subsequently passed.

It is true that this court has repeatedly held that the discharge of the duty imposed upon it by the Constitution to make effectual the provision that no State shall pass any law impairing the obligation of a contract, requires this court to determine for itself whether there is a contract, and the extent of its binding obligation, and parties are not concluded in these respects by the determination and decisions of the courts of the States. While this is so, it has been frequently held that where a statute of a State is alleged to create or authorize a contract inviolable by subsequent legislation of the State, in determining its meaning much consideration is given to the decisions of the highest court of the State. Among other cases which have asserted this principle are *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, and *Vicksburg* v. *Vicksburg Water Co.*, 206 U. S. 496, 509.

Both sides contend that the decisions of the Supreme Court of the State have decided this controversy. The plaintiff in error insists that it is governed by *Linden Land Co.* v. *Milwaukee Electric Ry. & Light Co.*, 107 Wisconsin, 493. In that case an injunction was sought by a tax-payer and owner of property abutting upon the street, to enjoin the Company from accepting the franchise and the state officers from receiving the acceptance of the ordinance of 1900. The Linden Land Company and another, as tax-payers and owners of land abutting upon the street were afterwards brought in as plaintiffs, and the court, speaking of § 1862, said the City was empowered to grant the use of streets and franchises to street railway companies upon such terms as the proper authorities should determine, and that that was a broad grant of discretionary powers, and also said that in the character of suit then before it, the right to maintain it depended upon whether there had been shown any wrongful squandering or surrender of the

moneys, property or property rights of the City, or unlawful increase of the burdens of taxation threatened by the proposed ordinance, and held that the claim that parties had offered large sums of money for the franchise privileges granted to the Company, and that the Company itself had offered to pay large sums of money in case the City would grant the right to charge five cents fare until the year 1935, did not sustain the allegation that there was a squandering of the money and rights of the City, in rejecting the offers and enacting the ordinance. We do not find in this case any decision of the question here involved, as to whether the alleged contract between the City and the Company would have the effect to deny, because of the provisions granting authority to the City in § 1862, the subsequent right of the legislature to fix rates binding upon the Company.

The Chief Justice in the opinion in the present case regarded the construction of § 1862 as controlled by the previous case of *Manitowoc* v. *Manitowoc & N. T. Co.*, 145 Wisconsin, 13. In that case, the Supreme Court of Wisconsin used the following language, which is quoted with approval by the Chief Justice in this case:

"No specific authority having been conferred on the city to enter into the contract in question, the right of the State to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the State saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting sec. 1862, Stats. (1898), or sec. 1863, Stats. (Supp. 1906: Laws of 1901, ch. 425), the State intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the State saw fit to act."

The Chief Justice further pointed out that § 1863, which

was in question in the *Manitowoc Case*, was substantially the same as § 1862, involved in the present case, for while § 1863 authorized consent by municipal authorities to the use of streets upon such terms and subject to such rules and regulations and the payment of such license fees as the council or board may from time to time prescribe, it was the same in effect as § 1862, authorizing municipal authorities to grant the use of streets upon such terms as they shall determine, and concluded:

"We are of opinion, therefore, that the holding in the *Manitowoc Case*, to the effect that neither section indicated any legislative intention of surrendering the sovereign power of the state to regulate fares, was entirely correct and was advisedly made."

While it is true that the opinion of the Chief Justice in this case was concurred in by only two other judges of the six who sat on this appeal, in view of the decision of the same court in the *Manitowoc Case*, we can have no doubt that the judicial interpretation of § 1862 by the highest court of the State of Wisconsin denies authority to municipal corporations to make contracts concluding the State from the future exercise of its power to fix the rates which may be charged by such public service corporations as are here involved.

In view of the weight which this court gives in deciding questions involving the construction of legislative acts to decisions of the highest courts of the States in cases of alleged contracts, and our own inability to say that this statute unequivocally grants to the municipal authorities the power to deprive the legislature of the right to exercise in the future an acknowledged function of great public importance, we reach the conclusion that the judgment of the Supreme Court of Wisconsin in this case should be affirmed.

We may observe that the contention of deprivation of property without due process of law, is practically dis-

posed of in what we have said. For if the State might still exercise its authority to fix rates notwithstanding the so-called contracting ordinance, the exercise of such lawful power could not deprive the plaintiff of property without due process.

Affirmed.

WASHINGTON–VIRGINIA RAILWAY COMPANY *v.* REAL ESTATE TRUST COMPANY OF PHILADELPHIA.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 212. Argued April 29, 30, 1915.—Decided June 14, 1915.

Whether a corporation is doing business within a district so as to have submitted itself to the jurisdiction, and was present therein so as to warrant service of process upon it, depends in each case upon the facts proved.

In this case, while the corporation operates railways outside of Pennsylvania and has its general office and keeps one of its bank accounts outside of that State, it has an office in the Eastern District and that State, where its president and treasurer reside, and has an office and keeps bank accounts, within that District; and under all the circumstances of the case, *held* that the corporation defendant had submitted to the local jurisdiction, enjoyed the protection of the laws, and therefore service within the District on its president was sufficient to give the District Court jurisdiction.

THE facts, which involve the question of whether the plaintiff in error had been properly served with process so as to give the District Court jurisdiction of the action, are stated in the opinion.

Mr. William A. Glasgow, Jr., with whom *Mr. John S. Barbour* and *Mr. Norman Grey* were on the brief, for plaintiff in error.

Mr. John G. Johnson, with whom *Mr. Joseph DeF. Junkin* was on the brief, for defendant in error.

Mr. Justice Day delivered the opinion of the court.

This case is here upon the single question of the jurisdiction of the United States District Court for the Eastern District of Pennsylvania to entertain the action. The suit was begun by the Real Estate Trust Company of Philadelphia, against the Washington-Virginia Railway Company, a corporation of the State of Virginia, to recover a judgment on certain bonds made by the Washington, Alexandria & Mt. Vernon Railway Company, also a Virginia corporation, payment of which, it was alleged, had been assumed by the Washington-Virginia Railway Company. The summons in the action was served upon the president of the defendant Railway Company, at its office in Philadelphia, by handing a true and attested copy of the summons to the president, at such office.

There is no question that the president was the proper officer to serve, and that he was duly served with process. The contention of the plaintiff in error is that the service is void and the court without jurisdiction because at the time of the service of process the defendant corporation was not doing business in the Eastern District of Pennsylvania, wherein service was made. As this court has had frequent occasion to say, each case of this kind must depend upon its own facts, and the question is whether the defendant corporation had submitted itself to the local jurisdiction and was present therein so as to warrant service of process upon it. See *St. Louis &c. Railway* v. *Alexandria*, 227 U. S. 218, and previous cases in this court cited on page 226.

The District Court found certain facts, from which it appears: The defendant is the successor to two electric railway companies, one of which was the Washington,

Alexandria & Mount Vernon Railway Company, which issued the bonds upon which the present suit was brought. The defendant company operates electric railway lines from Mount Vernon to Alexandria, in the State of Virginia, and from that city to Washington, in the District of Columbia. Under the laws of Virginia, the defendant company might have offices outside the State. The Virginia office of the company, under the laws of Virginia, must be kept in that State, and was at Mount Vernon, where there was a ticket agent, and where the annual meetings of the stockholders were held. The company maintained a general office at Washington, D. C., where the business of conducting the physical operation of the road was carried on through its manager. At the Washington office the cash books of the company were kept, showing daily receipts, collection of accounts due, operating record, pay roll, time record, and statement of claims accruing and their payment as made. No books of the company concerning its business were kept at the Mount Vernon office. The commercial account of the company was kept at the Commercial National Bank, of Washington, D. C., where the receipts from the operation of the road were deposited, and where checks for operating expenses were drawn on that bank. The company also kept three smaller accounts in Alexandria, Virginia.

For some time prior to the merger, the Washington, Alexandria & Mount Vernon Railway Company maintained an office in the Real Estate Trust Building, at Philadelphia, which office was leased by the president of that company, one Clarence P. King, who subsequently became president of the merged company and who was succeeded by Frederick H. Treat, president of the defendant company at the time of the service of this writ. The defendant company paid rental to Mr. King at the rate of fifty dollars per month, which covered the right of desk room for its president, treasurer and bookkeeper, and the

use of the furniture, fixtures and telephone in the office. No formal authority from the directors appears for maintaining any office except that at Mount Vernon, Virginia, but the by-laws of the company provide that its stock shall be transferred only on the books of the company at the office of its treasurer. Upon application for listing its stock on the Washington Stock Exchange, the Washington, Alexandria & Mount Vernon Railway Company, through its president, declared that the principal office of the company was located at Mount Vernon, Virginia, with branch offices at Washington and Philadelphia.

After the merger, the defendant applied to the Philadelphia Stock Exchange for the listing of its securities, and declared in its application "Stock is transferred at the Company's General Office, 1307 Real Estate Trust Building, Philadelphia, and registered by the Girard Trust Company, Philadelphia, Registrar," and declared its offices to be as follows:

"Offices:

"Principal, Mt. Vernon, Virginia.

"General and Transfer, 1307 Real Estate Trust Building, Philadelphia.

"Washington: 1202 Pennsylvania Avenue."

At the office in Philadelphia, the corporation kept its regular business ledgers, its stock transfer books and stock ledgers. The bookkeeper of the company had his desk in the office at Philadelphia, made his entries in the corporation books kept there, and conducted general correspondence in relation to the Company's business at that office. The treasurer of the company maintained the only treasurer's office of the company there, and had there his desk, papers, and books. The company had four bank accounts in Philadelphia, into which accounts, from time to time, was deposited the surplus of cash not needed in the active operation of the company. Out of these ac-

counts were paid interest on mortgages, dividends, and the larger bills, by checks drawn at the Philadelphia office by the treasurer, and the deposit and check books on such banks were kept at the Philadelphia office. The president kept the official seal of the company in Philadelphia. The president and treasurer lived in Philadelphia. The president had his desk at the office in the Real Estate Trust Building, where he was present two days in each week and went to Washington twice a week. While in Philadelphia, the president transacted such business of the company as came to his attention, and conducted the correspondence of the company upon official stationery, upon which appeared the address at the Real Estate Trust Building, and the words, "Office of F. H. Treat, President, Philadelphia," or, "Office of the President, Philadelphia." The bills of the company, after approval in Washington by the manager of the railway, were sent to Philadelphia for examination and approval, and the checks for payment were drawn at the Philadelphia office and forwarded to Washington. No one at the Washington office had authority to draw checks. No money was paid out at the Washington office except petty cash for daily expenses.

With this finding of facts counsel for the plaintiff in error finds little fault. The objection is rather to the inference drawn by the court below from such facts. It is urged that the keeping of the books in Philadelphia was for the convenience of the president and treasurer, but it also appears that such books were required to be kept by the by-laws of the company. Among the uncontroverted facts it appears that the defendant company had an office in the city of Philadelphia, where the president of the company lived upon whom service was made, and that at this office the treasurer of the company, who also lived in Philadelphia, kept its regular books, and from this office was conducted a general correspondence in relation to the business of the company. The company kept

four bank accounts in separate banks in the city of Philadelphia, where money was deposited and checked out in payment of mortgages, dividends, and the larger bills of the company. Such business of the company as required his attention at the Philadelphia office was there transacted by the president. Checks for payment of bills of the company at Washington were drawn at Philadelphia and forwarded to Washington.

We think the mere recital of these facts makes it evident that the corporation was properly served. It had submitted itself to the local jurisdiction, and there enjoyed the protection of the laws. In that jurisdiction by duly authorized agents it was at the time of service transacting an essential and material part of its business.

It follows that the judgment of the District Court, maintaining its jurisdiction, must be

Affirmed.

ADAMS EXPRESS COMPANY *v.* COMMONWEALTH OF KENTUCKY.

ERROR TO THE CIRCUIT COURT OF WHITLEY COUNTY, STATE OF KENTUCKY.

No. 271. Argued May 10, 11, 1915.—Decided June 14, 1915.

The first resort, with a view to ascertaining the meaning of a statute, is to the language used; if that is plain there is an end to construction and the statute is to be taken to mean what it says.

The purpose of Congress in enacting the Webb-Kenyon Act of March 1, 1913, c. 90, 37 Stat. 69, was not to prohibit all interstate shipment or transportation of liquor into so-called dry territory, but to render the prohibitory provisions of the statute operative whenever, and only when, the liquor is to be dealt with in violation of the law of the State into which it is shipped.

Except as affected by the Wilson Act of 1890, which permits state laws to operate on interstate shipments of liquor after termination of transportation to the consignee and the Webb-Kenyon Act of 1913, which prohibits interstate transportation of liquor into a State to be dealt with therein in violation of the laws of that State, the interstate transportation of liquor is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution.

As it appears that an interstate shipment of liquor into Kentucky was not to be used in violation of the laws of that State as such laws have been construed by its highest court, the Webb-Kenyon Act had no effect to change the general rule that a State may not regulate commerce which is wholly interstate.

THE facts, which involve the construction and application of § 2569a of the statutes of Kentucky in regard to local option and of the Act of Congress known as the Webb-Kenyon Law, are stated in the opinion.

Mr. Joseph S. Graydon and *Mr. Lawrence Maxwell* for plaintiff in error:

A citizen of Kentucky has the constitutional right to possess and use intoxicating liquors.

The cases in the Court of Appeals of Kentucky upheld this right as well as the cases in other States.

The Webb-Kenyon Law does not authorize the application of a state statute to an interstate shipment for lawful, personal use.

The purpose of the law as shown by debates in Congress and the cases in the Court of Appeals of Kentucky and other courts also so hold.

There are conflicting opinions on the subject, involving the West Virginia law; on which appeals are pending in this court.

The cases involving imported liquors intended to be used in violation of law can be distinguished.

The Webb-Kenyon Law, as construed and applied by the lower court, would be unconstitutional.

In support of these contentions, see *Adams Exp. Co.* v. *Kentucky*, 214 U. S. 218; *Adams Exp. Co.* v. *Commonwealth*, 154 Kentucky, 462; *Adams Exp. Co.* v. *Commonwealth*, 160 Kentucky, 66; *Adams Exp. Co.* v. *Crigler*, 161 Kentucky, 89; *American Exp. Co.* v. *Beer*, 65 So. Rep. 575; *Anderson Net Co.* v. *Worthington*, 141 U. S. 468; *Atkinson* v. *Southern Exp. Co.*, 94 S. Car. 44; *Bristol Distributing Co.* v. *Southern Exp. Co.* (Sup. Ct. App. of Virginia, unreported); *Calhoun* v. *Commonwealth*, 154 Kentucky, 70; *Clark Distilling Co.* v. *American Exp. Co.*, 219 Fed. Rep. 339; *Clark Distilling Co.* v. *West. Maryland Ry.*, 219 Fed. Rep. 333; *Commonwealth* v. *Campbell*, 133 Kentucky, 50; *Commonwealth* v. *Smith*, 163 Kentucky, 227; *Delaware* v. *Grier*, 88 Atl. Rep. 579; *Downes* v. *Bidwell*, 182 U. S. 244; *Dunlap* v. *United States*, 173 U. S. 65; *Eidge* v. *Bessemer*, 164 Alabama, 599; *Hamm Brewing Co.* v. *Chicago, R. I. & P. Ry.*, 215 Fed. Rep. 672; *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Iowa* v. *U. S. Exp. Co.*, 145 N. W. Rep. 451; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 19; *Kansas* v. *Doe*, 92 Kansas, 212; *Kirmeyer* v. *Kansas*, 236 U. S. 568; *Louis. & Nash. R. R.* v. *Cook Brewing Co.*, 223 U. S. 70; *Martin* v. *Commonwealth*, 153 Kentucky, 784; *North Carolina* v. *Cardwell*, 166 N. Car. 308; *North Carolina* v. *Williams*, 146 N. Car. 618; *Palmer* v. *Southern Exp. Co.*, 165 S. W. Rep. 236; *Ex parte Peede*, 170 S. W. Rep. 749; *In re Rahrer*, 140 U. S. 155; *Rhodes* v. *Iowa*, 170 U. S. 412; *Smith* v. *Southern Exp. Co.*, 82 S. E. Rep. 15; *Southern Exp. Co.* v. *Alabama*, 66 So. Rep. 115; *Southern Exp. Co.* v. *High Point*, 83 S. E. Rep. 254; *United States* v. *Oregon Navigation Co.*, 210 Fed. Rep. 378; *Vance* v. *Vandercook* (1), 170 U. S. 439; *VanWinkle* v. *State*, 91 Atl. Rep. 385; *West Virginia* v. *Adams Exp. Co.*, 219 Fed. Rep. 331 and 794. See also Committee on Judiciary hearings, January 11, 1912; Congressional Record, Feb. 8, 1913, p. 365; Freund on Police Power, § 453; Kentucky Criminal Code, § 347;

Kentucky Statutes, § 2569a; Webb-Kenyon Law, 37 Stat. 699.

Mr. James Garnett, Attorney General of the State of Kentucky, with whom *Mr. Robert T. Caldwell*, Assistant Attorney General of the State of Kentucky, was on the brief, for defendant in error.

Mr. W. B. Wheeler and *Mr. J. B. Snyder* filed a brief as *amicus curiæ* by permission of the court.

MR. JUSTICE DAY delivered the opinion of the court.

The Adams Express Company was indicted for violation of § 2569a of the statutes of the State of Kentucky, which, omitting the portions not essential to the consideration of this case, provides:

"It shall be unlawful for any . . . public or private carrier to bring into, . . . deliver or distribute, in any county, district, precinct, town or city, where the sale of intoxicating liquors has been prohibited, . . . any spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called; and this act shall apply to all packages of such intoxicating liquors whether broken or unbroken. . . . Any . . . public or private carrier violating the provisions of this act shall be deemed guilty of violating the local option law and shall be fined not less than fifty nor more than one hundred dollars for each offense. . . . And the place of delivery of such liquors shall be held to be the place of sale; . . ."

The charge of the indictment was that the Adams Express Company, doing the business of a common carrier in Kentucky, did knowingly bring into and deliver in Whitley County of that State certain intoxicating liquors to one John Horshaw, contrary to law. This case, with

eighteen others, was heard in the Circuit Court of Whitley County, upon an agreed statement of facts, which stipulated that the Adams Express Company was engaged in the business of a common carrier and did such business in Whitley County, Kentucky, and between that county and the cities of Jellico and High Cliff, in the State of Tennessee. That on the dates named in the indictments the Adams Express Company knowingly brought into, transferred, delivered and distributed certain spirituous liquors, to wit: whiskey, in local option territory and where the local option law was in force, as charged in the indictment. That before bringing such liquors into such territory the consignees of said liquors, being the persons named in the indictment, sent orders by mail for such liquors to dealers at Jellico and High Cliff, in the State of Tennessee, and paid the purchase price of said liquors to said dealers at the places named in Tennessee. That upon receipt of the orders, the dealers, at their respective places of business at Jellico and High Cliff, Tennessee, for the purpose of filling such orders delivered to Adams Express the several packages of liquor, directing the Express Company to carry and deliver the same to such persons; that the Adams Express Company did thereupon carry said packages of liquor from Jellico and High Cliff, in Tennessee, into Whitley County, Kentucky, and there delivered the same to the consignees thereof, who were the persons who had made the orders and to whom the indictments charged the defendant with delivering and distributing the liquors mentioned. That the liquors were intended by said consignees for their personal use and were so used by them, and were not intended by them to be sold contrary to law, and were not so sold by them. That the transactions and all of them described occurred since the enactment and going into effect of the Act of Congress known as the Webb-Kenyon Law.

The Express Company requested a peremptory instruc-

tion for a verdict of not guilty because the shipments of liquor were interstate shipments and constituted interstate commerce within the meaning of the commerce clause of the Federal Constitution. That the liquors being for the personal use of the consignees respectively § 2659a is repugnant to the constitution of Kentucky, and if the indictment was authorized by the Act of Congress known as the Webb-Kenyon Law, that law is in contravention of the interstate commerce clause of the Constitution of the United States and of the Fifth and Fourteenth Amendments to the Constitution. This request for a peremptory instruction for the defendant was refused. The court instructed the jury that if it believed from the evidence that the Adams Express Company, as a common carrier, brought any spirituous, vinous or malt liquors into Whitley County, being local option territory in the State of Kentucky, and there delivered the same to the persons named in the indictment, then the defendant was guilty and its punishment should be fixed at not less than fifty dollars nor more than one hundred dollars; and that upon the whole case if they had any reasonable doubt of the guilt of the Company they should find a verdict of not guilty. The defendant duly excepted to the giving of these instructions and to the refusal to grant its prayer for a peremptory instruction. The Company was convicted, and fined in the sum of fifty dollars. That amount not being sufficient to give the Court of Appeals of the State jurisdiction, a writ of error was taken from this court to the Circuit Court of Whitley County.

The Kentucky statute now under consideration was before this court in the case of *Louis. & Nash. R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70. In that case it was held that, as applied to interstate shipments, the statute was void as an attempt by the State to regulate commerce among the States. Such must still be the fate of the statute unless it is the effect of the Act of Congress of March 1,

1913, c. 90, 37 Stat. 699, known as the Webb-Kenyon Act, to require a different result. That Act provides:

"An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.

"Be it enacted, &c., that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited."

Before entering upon a consideration of the meaning of this act, it is well to have in mind certain principles of constitutional law and, as well, certain legislation of Congress upon this subject in force at the time when the Webb-Kenyon Act was passed. The Constitution of the United States grants to Congress authority to regulate commerce among the States, to the exclusion of state control over the subject. This power is comprehensive, and subject to no limitations, except such as are found in the Constitution itself. This general principle runs through all the cases decided in this court considering the matter, and has never been questioned since Chief Justice Marshall, for the court, delivered the judgment in *Gibbons* v. *Ogden*, 9 Wheat. 1. Applying this general principle,

it was held by this court in *Leisy* v. *Hardin*, 135 U. S. 100, that the State of Iowa, in the absence of congressional permission, had no authority to prohibit the sale of liquor in original packages in the hands of importers from other States in that State, and the court there declared that, whatever the individual views of its members might be concerning the deleterious qualities of certain articles of commerce, when such articles were recognized by Congress as legitimate subjects of interstate commerce such interstate traffic could not be controlled by the laws of the State amounting to regulations thereof. In the course of the consideration of this case, this court said (pp. 123, 124):

"The responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

After the decision of *Leisy* v. *Hardin*, Congress passed the Wilson Act of 1890, 26 Stat. 313. That act made intoxicating liquors transported in interstate commerce subject to the exercise of the police power of the States upon arrival in the State, in the same manner as though such liquors had been produced in the State or Territory into which the same were shipped. The constitutionality of that act was attacked and came under consideration in this court in *In re Rahrer*, 140 U. S. 545, where the law was upheld. In affirming the right of Congress to pass the statute, this court said (p. 561):

"In so doing, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws. It has taken its own course and made its own regulation, applying to

these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property. . . .

"(P. 564) Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

In *Rhodes* v. *Iowa*, 170 U. S. 412, it was held that the Wilson Act did not have the effect to permit interstate shipments of liquor to come under the operation of the liquor laws of the State until after their delivery to the consignee, and that one receiving liquor shipped in interstate commerce obtained the right to use the same, although he no longer had the right to sell it free from the restrictions imposed by the laws of the State. And see *Vance* v. *Vandercook*, 170 U. S. 438.

From what we have said, it follows that, before the passage of the Webb-Kenyon Act, while the State in the exercise of its police power might regulate the liquor traffic after the delivery of the liquor transported in interstate commerce, there was nothing in the Wilson Act to prevent shipment of liquor in interstate commerce for the use of the consignee, provided he did not undertake to sell it in violation of the laws of the State. The history of the Webb-Kenyon Act shows that Congress deemed this situation one requiring further legislation upon its part, and thereupon undertook, in the passage of that Act, to deal further with the subject, and to extend the prohibitions against the introduction of liquors into the States by means of interstate commerce. That the act did not assume to deal with all interstate commerce shipments of intoxicating liquors into prohibitory territory in the States

is shown in its title, which expresses the purpose to divest intoxicating liquors of their interstate character in certain cases. What such cases should be was left to the text of the act to develop.

It is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used. If that is plain there is an end to construction and the statute is to be taken to mean what it says.

Extraneous words omitted, this statute reads: "The shipment or transportation of . . . intoxicating liquors from one State . . . into another State . . . which intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited." It would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the State into which it is thus shipped or transported. Such shipments are prohibited only when such person interested intends that they shall be possessed, sold or used in violation of any law of the State wherein they are received. Thus far and no farther has Congress seen fit to extend the prohibitions of the act in relation to interstate shipments. Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the State to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution.

It becomes necessary, therefore, to inquire whether a

shipment of the character here in question comes within the terms of the Webb-Kenyon Act, because of the purpose to use the liquor in violation of the law of the State of Kentucky. The stipulation upon which the case was tried shows that the liquor was bought and paid for in Tennessee, and was shipped from that State into the State of Kentucky for the personal use of the consignee without any intention on his part to dispose of it contrary to the law of the State.

The case under review was one of nineteen tried under the same stipulation. In one of them the fine imposed was large enough to give jurisdiction to the Court of Appeals of Kentucky, and the case before that court is found in 154 Kentucky, 462. Considering whether such shipment was in violation of the law of the State, that court, after commenting upon the fact that the stipulation showed that the liquors were intended by the consignees for their personal use and were not intended by them to be sold and were not sold, contrary to law, further said:

"This being the purpose for which the liquor was intended to be received, possessed and used, it is clear that the consignees who received from the carrier the liquor did not, in so doing, violate or intend to violate any law of this state, because there is not and never has been any law of this state that prohibited the citizen from purchasing, where it was lawful to sell it, intoxicating liquor for his personal use, or from having in his possession for such use liquor so purchased. *Calhoun* v. *Commonwealth*, 154 Kentucky, 70; *Martin* v. *Commonwealth*, 153 Kentucky, 784. As said in *Commonwealth* v. *Campbell*, 133 Kentucky, 50:

"'The history of our state from its beginning shows that there was never even the claim of a right on the part of the Legislature to interfere with the citizen using liquor for his own comfort, provided that in so doing he committed no offense against public decency by being intoxicated;

and we are of opinion that it never has been within the competency of the Legislature to so restrict the liberty of the citizen, and certainly not since the adoption of the present Constitution. The Bill of Rights, which declared that among the inalienable rights possessed by the citizens is that of seeking and pursuing their safety and happiness, and that the absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority, would be but an empty sound if the Legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public. . . . Therefore the question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society.'"

And further,

"It, therefore, appears that the issue in this case really comes down to this, was the liquor involved in this transaction intended by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of this state? It is shown by the agreed state of facts, when considered in the light of the Constitution and laws of the state, and the opinions of this court, that it was not."

In the subsequent case of *Adams Express Company* v. *Commonwealth*, 160 Kentucky, 66, it appeared that the liquor was intended by the consignee to be sold in violation of the law of the State, and was so sold, and the court held that in such case the carrier was bound before the delivery of the whiskey, to be circumspect and to use

ordinary care to learn the purpose for which it was to be used, and if, acting in good faith upon reasonable grounds, the carrier was misled, it was not liable, otherwise it was; and that the question was one of fact for the jury. The court, however, expressly adhered to its ruling in *Express Co.* v. *Commonwealth*, 154 Kentucky, *supra*, under facts such as were there presented, and such as appear in the case now under consideration.

It therefore follows that, inasmuch as the facts of this case show that the liquor was not to be used in violation of the laws of the State of Kentucky, as such laws are construed by the highest court of that State, the Webb-Kenyon Law has no application and no effect to change the general rule that the States may not regulate commerce wholly interstate. As it appears that the conviction in this case was for an interstate transportation, not prohibited by the Webb-Kenyon Act, the rights under the interstate commerce clause of the Constitution expressly set up by the Express Company were denied by the judgment of conviction in the Circuit Court of Whitley County, and that judgment must accordingly be reversed.

Reversed.

COMMONWEALTH OF VIRGINIA *v.* STATE OF WEST VIRGINIA.

IN EQUITY.

No. 2. Original. Argued April 27, 28, 29, 1915.—Decided June 14, 1915.

This controversy being one between States, referred to this court in reliance upon the honor and constitutional obligations of the parties, it has been determined only after the amplest opportunity for hearing and with full recognition of every existing equity.

West Virginia is entitled to have the assets in the Virginia sinking fund

and those specifically appropriated for payment of the debt applied in reduction of her share of the debt in the same proportion (23½%) as she is liable therefor.

The proper date for the division of the assets in the sinking fund and the taking account of the indebtedness to be divided between Virginia and West Virginia is January 1, 1861, as fixed by the contract.

In proving market value, accredited price-currents, lists and market reports, including those published in trade journals and newspapers which are considered trustworthy are admissible in evidence.

Shares of stock represent the proportionate interest of the shareholders in the corporate enterprise; and a rule that this interest should, in the absence of supporting testimony, be taken as actually worth the par of the shares would be artificial, and not justified by any exigency in the administration of justice.

An asset consisting of a debt due in a Confederate State which was paid in full in Confederate money should not for that reason be valued in adjusting accounts as of 1861 at less than the face value.

In estimating the value of bank stocks at book value an allowance of five per cent. for liquidation and realization is proper.

After considering all the exceptions to the Master's second report in this case, *held* that there should be deducted from West Virginia's share (23½%) of the principal debt of Virginia on January 1, 1861, already fixed, 220 U. S. 1, 35, at $7,182,507.46, the same proportionate part of the value of the assets in the sinking fund on that date and retained by Virginia amounting to $2,966,885.18, so that West Virginia's net share of the debt, is now fixed at $4,215,622.28 exclusive of interest.

A contract is to be interpreted according to its true intent although varied conditions may have during the lapse of years varied the form of fulfilment; in this case there are no equities which destroy the contract claim.

In a contract between sovereign States the questions of whether the debtor party is liable for interest on ascertainment of the amount due and rate of interest and period from which it should be computed are to be determined by the fair intendment of the contract itself.

It is not in derogation of its sovereignty that a State be charged with interest if the agreement so provides.

A contract on the part of a State to assume an equitable proportion of an interest-bearing debt means the taking over of the liability for interest as well as principal.

In determining what rate of interest West Virginia should pay on the

proportion of the debt of Virginia assumed, the action of Virginia in regard to interest on the debt should be considered and under all the circumstances of the case *held*, in fixing the equitable proportion of West Virginia, that her part of the principal should be placed on a three per cent. basis as of July 1, 1891, with three per cent. per annum interest from that date, and with four per cent. per annum interest from July 1, 1861, to July 1, 1891, making a total of interest to July 1, 1915, of $8,178,307.22 and the total of the debt $12,393,929.50.

The decree shall provide for interest on five per cent. per annum on the total amount awarded by the decree from the date of entry.

THE facts, which involve the final adjustment between Virginia and the State of West Virginia and the determination of the equitable proportion of the debt of Virginia which the State of West Virginia agreed to assume and the liability of the latter for interest thereon, are stated in the opinion.

Mr. Holmes Conrad and *Mr. Sanford Robinson* for the bondholding creditors.

Mr. Randolph Harrison, with whom *Mr. John Garland Pollard*, Attorney-General for the State of Virginia, and *Mr. Wm. A. Anderson* was on the brief, for complainant.

Mr. A. A. Lilly, Attorney-General of the State of West Virginia, and *Mr. John H. Holt*, with whom *Mr. Chas. E. Hogg* was on the brief, for defendant.

MR. JUSTICE HUGHES delivered the opinion of the court.

Upon the hearing in 1911, it was determined that the public debt of Virginia, as of January 1, 1861,—of which West Virginia agreed to assume 'an equitable proportion'—amounted to $33,897,073.82; that, in view of a reduction secured by Virginia and with the consent of her creditors, the amount to be apportioned was $30,563,861.56; that the apportionment should be made according to the estimated value of the property of the

two States at the time of their separation, June 20, 1863; and that upon this basis the proportion of West Virginia was 23.5 per cent., making her share of the principal of the debt $7,182,507.46. While the fundamental issues were thus decided, the controversy was not completely determined. In view of the consideration due to the character of the parties, and of the fact that the cause was 'a quasi-international difference referred to this court in reliance upon the honor and constitutional obligations of the States concerned,' it was deemed advisable to go no farther at that stage but to afford opportunity for conference and adjustment. Accordingly, the question of interest was left open. *Virginia* v. *West Virginia*, 220 U. S. 1, 35, 36.

At the following Term, a motion on the part of Virginia that the court should proceed at once to final decree was denied in the light of the public reasons urged for the granting of further time. 222 U. S. 17. Another application of this sort was made by Virginia in November, 1913, and was again refused, and the cause was assigned for final hearing in April, 1914. 231 U. S. 89.

At that time, West Virginia as a result of her investigations asked permission to file a supplemental answer asserting the existence of credits, which she claimed as against the portion of the principal debt assumed, and also alleging grounds why she should not be charged with interest. Without expressing an opinion as to the propriety of allowing any of the described items of credit, and refraining from applying the ordinary and more restricted rules of procedure which would govern in cases between private litigants, the court granted the application to the end that this public controversy should be determined only after the amplest opportunity for hearing and with full recognition of every equity that might be found to exist. The subject-matter of the supplemental answer, considered as traversed by Virginia, was at once referred to Charles E. Littlefield, Esq., the Master before

whom the former proceedings had been had, with directions to hear and consider such pertinent evidence as West Virginia might offer, and such counter-showing as Virginia might make, and to report the evidence with his conclusions deduced therefrom, together with a statement of his views 'concerning the operation and effect of the proof thus offered, if any, upon the principal sum found to be due by the previous decree of this court,'—that decree meanwhile to remain wholly unaffected. 234 U. S. 117.

The Master's report has been filed, all the questions remaining to be determined have been fully argued, and the case is before us for final decree.

At the outset, the Master states that the extensive investigation involved in the later reference, with respect to the existence and the value of the various assets claimed as credits, was then prosecuted for the first time; and that so far as these items had been referred to in the earlier proceeding, it was for an entirely different purpose in the main. The Master reports that, in his view, the assets as detailed by him were applicable according to their value as of January 1, 1861, to the public debt of Virginia which was to be apportioned as of that date; that the value of these assets then amounted to $14,511,945.74, of which West Virginia's share—23½ per cent.—would be $3,410,307.25. That if this amount were to be credited to her in reduction of her liability there should be offset certain moneys and stocks received by her from the Restored Government of Virginia aggregating $541,467.76, leaving a net credit to West Virginia of $2,868,839.49. This would reduce West Virginia's liability for principal from $7,182,507.46 to $4,313,667.97. The Master also concluded that West Virginia by virtue of her contract with Virginia is liable for interest from January 1, 1861, the date as of which her share of the principal is determined.

The ground for the allowance of the credits is that the moneys and securities in question had been specifically dedicated to the payment of the public debt. The moneys embraced cash in the sinking fund on January 1, 1861, and the securities had been purchased with proceeds of the debt. In 1838, the General Assembly of Virginia in authorizing the negotiation of loans provided that the stock of any joint stock company purchased with the money so borrowed, together with the dividends and other net income which might accrue therefrom to the Commonwealth, should be, and were, 'appropriated and pledged' for the payment of the interest and for the final redemption of the principal borrowed. Act of April 9, 1838, § 3. The constitution of 1851 directed the creation of a sinking fund which was to be applied to the debt (Art. IV, § 29) and, with respect to the State's stocks, thus provided: "The General Assembly may, at any time, direct a sale of the stocks held by the Commonwealth in internal improvement and other companies; but the proceeds of such sale, if made before the payment of the public debt, shall constitute a part of the Sinking Fund, and be applied in like manner." *Id.*, § 30. In 1853, the legislature in establishing the sinking fund enacted a corresponding provision. Act of March 26, 1853, § 3. The question then is not one of the division of public property, merely because of its character as such. In the light of the origin and nature of the investments which the Master has reviewed and valued, and of the provisions of the constitution and statutes of the State, it is clear that these particular assets must be regarded as a fund specially devoted to the payment of the debt to be apportioned. In this view, West Virginia is entitled to have these assets taken into account in fixing the amount of her liability. It cannot be conceived that, being held for the undivided debt, it was intended that they should be applied exclusively to Virginia's share. As West Virginia is to bear 23½ per

cent. of the debt as it existed on January 1, 1861, she should be credited with a similar part of the fund, fairly valued, which had been pledged for its discharge. This equity is inherent in the obligation.

Both parties have filed exceptions to the report of the Master. The first two exceptions on the part of Virginia, and of her committee of bondholding creditors, raise the same point,—that is, that the Master erred in selecting January 1, 1861, instead of June 20, 1863 (the date of separation), as the time as of which the value of the assets should be ascertained.

The question must be determined by reference to the terms of the contract between the two States (220 U. S., p. 28) upon which the liability is based. The undertaking is found in the provision of the constitution of West Virginia, which conditioned her admission to the Union. It is as follows (Art. VIII, § 8):

"An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

It is not to be doubted that this fixed January 1, 1861, as the date of cleavage with respect to the amount of the debt to be apportioned. It is not important that this date was prior to the separation of the two States. It was competent for the parties to fix a date, and they did so. The explanation of the selection may readily be found in the course of events, but it is sufficient to note that the selection was made. The ascertainment of the ratio of division must not be confused with the fixing of the amount to be divided. With regard to the former, we decided that we must look to the time when West Virginia became

a State, that is, in determining the general resources of the two States when the separation was effected. 220 U. S., p. 34. But we did not refer to that time for the purpose of ascertaining the indebtedness which was to be apportioned. That, it was definitely stipulated by the agreement, was the debt as it stood on January 1, 1861. *Id.*, p. 27. It follows that credits then existing were to be applied as of that date. Otherwise, the net amount which equitably was to be divided would not be determined. For example, it is not disputed that on January 1, 1861, there were over eight hundred thousand dollars in cash in the sinking fund. If the amount of the debt was to be ascertained as of that date for the purpose of equitable division, the sinking fund would have to be credited as of the same date, either in reduction of the debt or by crediting to each State her proper share according to her proportion of the debt. We know of no method of accounting which would settle and finally divide the debt as of January 1, 1861, and credit the sinking fund as of 1863. The same is true of the assets which had been specifically appropriated for the payment of the debt. The very ground of the credit of their value implies that it should be allowed as of the time fixed for the taking of the account of the indebtedness to be apportioned. The exceptions referred to cannot be sustained.

There is the further exception presented by the bondholding creditors (not by Virginia) to the refusal of the Master to hold that Virginia should not be charged with a value in excess of the price or amount that she actually received. The argument treats the ultimate realization by Virginia as the criterion. We must again refer to the contract. It was not intended to create and it did not create for the two States a partnership or community of interest in these assets, or provide that they should be held in trust by Virginia for West Virginia. It contemplated that each State should assume a fixed amount of

the debt,—not that there should be equitable co-ownership of a sinking fund to be liquidated for joint account. It did not look to a future accounting for moneys realized after the vicissitudes of civil war. There was to be a complete and final determination of West Virginia's 'equitable proportion' of the debt existing on January 1, 1861, and the account with Virginia was to be closed. As to this share of West Virginia, she was to establish her own sinking fund. There was, however, the equity arising from the fact that moneys and securities had been specially set apart for the payment of the debt. The facts as to this were well known and, as we have said, it cannot be supposed that West Virginia's fair and just proportion was to be fixed on a basis which denied her an appropriate share in the fund thus constituted, applying that which was meant for the whole only to Virginia's part. In view of the situation of the parties, and of the equitable adjustment which was contemplated, the question necessarily becomes one of valuation as of the selected date, and not solely of the amount realized in the later years.

It is argued that we should take the ultimate proceeds whenever they were received, and by discounting these upon a six per cent. basis find their value as of January 1, 1861 (assuming that to be the proper date), and credit the amount thus ascertained as the then value of the securities. This contention cannot be maintained. It would seem to be clear that such a method could only be justified in exceptional instances, in the absence of other and better evidence. The amount of the ultimate proceeds may have probative force in particular cases, according to the proved circumstances, but it is not the criterion of the value to be determined.

We are thus brought to the findings as to value. The various items, and the amounts allowed, are classified by the Master (following the arrangement of the supplemental answer) as follows:

Class A, Cash in sinking fund,	$819,250.03
Class B, Stock of Richmond, Fredericksburg & Potomac Railroad Company,	323,167.36
Class C, Various other stocks, loans, etc. (19 items)	7,352,594.65
Class D, Interest and dividends accruing prior to January 1, 1861, and subsequently received, (20 items)	345,554.80
Class E, Bank stocks	3,802,357.48
Class F, Stocks sold to Atlantic, Mississippi & Ohio Railroad Company	204,688.42
Class G, Stock of James River & Kanawha Company	1,664,333.00
TOTAL	$14,511,945.74

Virginia and the bondholding creditors do not except to these findings on the basis of January 1, 1861, with respect to Class A, Class C (items 5 to 18, inclusive), and Classes D, E, and F. They except to the findings as to the value of the securities in Class B, Class C (items 1 to 4, inclusive, and item 19), and Class G. West Virginia has filed exceptions to the findings as to the same items (save item 19 in Class C) and also excepts to the findings of value in ten other instances. There are no exceptions on either side with respect to Class A and Class D.

To avoid repetition, the exceptions of both parties will be considered in connection with each item in dispute.

1. *Class B. Stock of the Richmond, Fredericksburg & Potomac Railroad Company.* Virginia held 2752 shares, of the par value of $275,200, out of a total stock issue of $1,116,100. This stock she still owns.

In connection with this item and the other valuations to which they except, Virginia and the bondholding creditors complain that the Master disregarded published

quotations and based his findings upon book value and earnings. The quotations referred to appeared in the 'Richmond Dispatch' a newspaper of high reputation, and embraced reports of sales by brokers of good standing. It is unquestioned that in proving the fact of market value, accredited price-current lists and market reports, including those published in trade journals or newspapers which are accepted as trustworthy, are admissible in evidence. *Cliquot's Champagne*, 3 Wall. 114, 141; *Fennerstein's Champagne*, 3 Wall. 145; *Chaffee* v. *United States*, 18 Wall. 516, 542; *Sisson* v. *Cleveland & Toledo Ry.*, 14 Michigan, 489; *Cleveland & Toledo Ry.* v. *Perkins*, 17 Michigan, 296; *Whitney* v. *Thacher*, 117 Massachusetts, 523; *Fairley* v. *Smith*, 87 N. Car. 367; *Moseley* v. *Johnson*, 144 N. Car. 257; *Nash* v. *Classon*, 163 Illinois, 409; *Washington Ice Co.* v. *Webster*, 68 Maine, 449; *Harrison* v. *Glover*, 72 N. Y. 451. We need not stop to review the decisions that are cited with respect to the extent of the preliminary showing of authenticity that is required (*Whelan* v. *Lynch*, 60 N. Y. 469; *Nor. & West. R. R.* v. *Reeves*, 97 Virginia, 284; *Fairley* v. *Smith*, *supra*) inasmuch as all the quotations asserted to have any bearing were received in evidence by the Master. We are now simply concerned with the question of their importance or weight, and whether they can be deemed to have the controlling effect that is sought to be ascribed to them.

Thus, with respect to the stock of the Richmond, Fredericksburg & Potomac Railroad Company, the published quotations were extremely meager. There was no stock exchange at Richmond and the transactions shown are very few. There is mention of two sales at 80 in November, 1860, but the number of shares sold is not stated or whether the sales were public or private. There are no reports of earlier sales or of any between that time and April, 1863. During this period, no quotations appear under the head of 'Bid' or 'Asked.' In Decem-

ber, 1860, and also in the early part of 1861, under the head of 'Quoted' there is mention of 76½ and 77 'Last sales,' but nothing appears at these times under the head of 'Sales,' and the time and amount of the 'last sales' referred to are not given. In short, we have very infrequent transactions, of unknown significance, which fall short of furnishing a satisfactory indication of the value of the large block of stock held by the State.

The fact, however, that there was no sufficient proof of market value was not an insuperable obstacle to the making of a fair valuation. It was clearly proper to introduce evidence tending to show the intrinsic value of the shares. *Nelson* v. *First National Bank*, 69 Fed. Rep. 798, 803; *Crichfield* v. *Julia*, 147 Fed. Rep. 65, 73; *Henry* v. *North American Construction Co.*, 158 Fed. Rep. 79, 81; *Murray* v. *Stanton*, 99 Massachusetts, 345; *Industrial Trust, Ltd.*, v. *Tod*, 180 N. Y. 215, 232; *State* v. *Carpenter*, 51 Oh. St. 83; *Redding* v. *Godwin*, 44 Minnesota, 355; *Moffitt* v. *Hereford*, 132 Missouri, 513. For this purpose, resort was had to corporate accounts and reports of the company's affairs. With respect to the competency of the proof (in the case both of this company and of others, the value of whose shares was in question) in the absence of supporting testimony as to the facts recited, the Master refers in his report to the provisions of the statutes of Virginia. By the act of March 15, 1856, it was provided that every railroad corporation in which the Commonwealth was interested as a stockholder or creditor should annually make report to the Board of Public Works showing the condition of the property and containing full information with respect to capital stock, indebtedness, details of cost, physical characteristics, equipment, statistics of transportation, and a detailed statement with an appropriate classification of earnings and expenses. By the same act reports were required from canal and navigation companies. The Master says: "The State was a stockholder in all of these

corporations. By her statute she required the returns to be made on oath for the information of the public. She published them for public information as true, and the publications are now a part of her public records." As such they were deemed to be admissible against her in this litigation. They were, of course, not regarded as conclusive, and the question of their weight was reserved.

In the case of the road now under consideration, the book value, based on the cost of the railroad and net current assets, was practically 150 as of January 1, 1861. It had increased from 144.2 on March 31, 1859, to 150.4 on March 31, 1861. This book value was deduced from the annual trial balances as of March 31 in each year, purporting to show assets and liabilities. The greater part of the surplus was invested in construction. There was evidence that the cost was carried forward carefully from year to year, generally under classified headings, and it did not appear to contain items that were not legitimate. The annual reports indicated the making of repairs and renewals to keep the road in good condition. Between 1848 and 1861, there were outlays amounting to $132,841.93, largely for added equipment and improvements, which had been charged to operating expenses. As to earnings, it appeared that the road had been built about 1837. There had been paid in dividends to March 31, 1861, $1,099,280.64. There were no dividends in 1856, 1857, and 1858. One-half of the dividends in 1854, and the dividends of 1855, 1859 and 1860, were paid in bonds; they were deducted in arriving at book value. The dividends for the eleven years ending with 1860 averaged 5.09 per cent. The Master found that capitalizing these on a six per cent. basis would give a value of $84.83 per share. He concluded that a fair estimate was to take the average of the book value and this 'earning value' as indicated by the dividends, or 117.43 per share. This gave

for the total holding of the State a value of $323,167.36, which the Master allowed.

West Virginia excepts to the finding upon the ground that the book value of 150 per share should have been taken. This would make a difference in the total value of the stock of $89,632.64 or in the amount of West Virginia's credit of $21,063.68.

The exception is not well taken. It is urged that the book value represents actual value where books are correctly kept. This is not necessarily true, as books may be said to be correctly kept, in a sense, when they truly state the items set forth. But cost carried forward may not be the same as present value. Despite repairs and renewals, a suitable allowance for depreciation may not have been made. It would be too much to say that there is any controlling presumption and it clearly would not have been just to value the shares on a statement of book cost and surplus without taking into consideration the earning capacity. It is also complained that if the dividends for fifteen years (from 1850 to 1864) had been taken the average would have been higher; but this included dividends after 1861 paid in Confederate currency. It may be said that in this instance (as distinguished from others to which we shall presently refer) the Master arrived at his 'earning value' by taking the dividends declared instead of the actual net receipts, and that the latter exceeded the former. But the statement introduced gave the dividends; there was no separate computation of earnings, and these are not shown except as they may be computed from the trial balances which we have only for three years prior to March 30, 1861.

The Master sought to give proper weight to all considerations. His estimate upon this record could be only an approximation, but aside from any question as to the propriety of the precise method of calculation employed, there can be no doubt that the result has support in the

evidence and does full justice to West Virginia. The exceptions are overruled.

2. *Class C. Items 1 to 4, inclusive.* These are railroad stocks and loans. In view of what has already been said, the exceptions may be disposed of briefly. The exception of Virginia and the bondholding creditors is substantially the same as that taken with respect to the item in Class B, and West Virginia insists that the full book value of the securities should have been allowed.

Item 1.—17,490 shares (par value $50) of the stock of the Orange & Alexandria Railroad Company. There was, in addition, a loan of $398,670.60 to this company, for which the Master allowed the face value.

There are no market quotations of this stock in 1860 or 1861. The company was incorporated about the year 1848. The book value was 50.27 in 1856, and 53.32 in 1860. This was deduced from the trial balance of 1856 and from the subsequent profits set forth by the reports to the State. There was no showing of allowance for depreciation. Dividends had been paid on preferred stock in 1857–9. It does not appear that any dividends were declared in 1860 or 1861, although apparently dividends to the amount of $31,604.09 had accrued prior to January 1, 1861, for which the State received dividend bonds; the time of the declaration of these is not given. The road was operated at a profit. Capitalizing the profits for five years ending with 1860 at 6 per cent. the Master found a value of 12.28, and taking the average of this value and the book value (53.32), he estimated the shares at 32.80, or at a total value of $573,672.

Item 2.—12,000 shares (par value $100) of the stock of the Richmond & Danville Railroad Company. Loan of $565,803.34 was allowed at face value.

There were published quotations of two sales, one in November, 1860, at 60, and another in January, 1861, at 57. The report does not give the number of shares sold

or whether the sale was public or private. There is reference at various dates under 'Quoted' to 'Last sales,' but actual sales are not stated prior to 1863, except as mentioned above. The company was incorporated in 1847. The book value of the stock in 1860 (derived from the trial balance of 1856 and the later profits) was 137.37. The total stock was $1,981,197.50. Apparently, only one dividend had been declared,—in 1859, at four per cent. But the profits were large. For six years they had been about nine per cent., and in 1860 they rose to about eleven per cent. The average for five years ending with 1860 was $179,782.12, which capitalized on a six per cent. basis would give a stock value of $2,996,368.67. In view of this showing of profit the Master allowed the book value, with a deduction of five per cent. or 132.37 per share, making for the 12,000 shares held by the State an allowance of $1,588,440.

The exception of West Virginia in this instance merely relates to the deduction of five per cent. The Master treated the book value as virtually a 'liquidation value' and held that to arrive at a fair estimate of the actual value there should be some deduction for the expense of realization and this, upon the testimony of the expert for West Virginia, he fixed at five per cent.

Item 3.—3,856 shares (par value $100) of the Richmond & Petersburg Railroad Company. Dividend bonds amounting to $33,408 were allowed at face value.

There are no quotations under the head of 'Sales,' but simply references under 'Quoted' to 'Last sales' (from 64 to 57½), without particulars. The road had been incorporated in 1836 and its outstanding stock in 1860 amounted to $835,750. The book value at that time was 121.86. The dividends for four years had averaged nearly six per cent. The yearly profits averaged more, or $53,627.66, which capitalized gave a share value of 106.95. The Master took the average of the book value and so-

called earning value, allowing per share 114.40, or for the total of the State's stock, $441,126.40.

Item 4.—Stock of the Virginia Central Railroad Company. The State held on September 30, 1860, $1,891,670.68, in par value, of this stock, out of the then total stock of $3,152,854.23. By December 30, 1860, through additional payments on her subscription, the holdings of the State were increased to $1,927,382.57. There were also a loan of $90,032.82 and dividend bonds amounting to $143,508 for which face value was allowed.

There are quotations of two sales in November, 1860, at 50, but without details as to amount sold or character of sale. There are no other quotations of actual sales down to 1863, but simply references to 'Last sales,' as in the other cases above noted. The book value per share in 1860 was 131.16. Dividends were paid apparently to the amount of a little more than four per cent. in 1859, and nearly five per cent. in 1860. Profits for four years, ending with 1860, averaged $221,234.06 which capitalized at six per cent. gave a share value of 116.95. Taking the average of this and the book value, or 124.05, the Master allowed for the shares owned by the State, $2,390,918.08.

It must be concluded that with respect to these four securities (as in the case of the item in Class B) the quotations did not afford sufficient proof of market value to sustain the contentions of Virginia. On the other hand, in the absence of a more complete showing with respect to the physical property and its condition, the expenditures for maintenance and the extent of depreciation, it is wholly impossible to say that the book cost represented the actual value at the time to which the inquiry was addressed. Book cost, as we have said, would be a more or less doubtful criterion. After the lapse of so many years, an appraisal of this sort is obviously a matter of the greatest difficulty, and while the Master's valuation of these stocks may be regarded as a liberal one it is

probably as fair an estimate as could be made upon the facts presented.

3. *Class C. Items 6, 8, 10, and 17.* The exceptions in these instances are solely by West Virginia.

Item 6. Stock of the Alexandria, Loudon & Hampshire Railroad Company. It appeared that between the time of incorporation (1853) and January 1, 1861, Virginia had invested in this stock $993,248. There were further investments making the total in April, 1862, $1,017,248. All this stock was sold by Virginia on November 25, 1867, at five dollars a share, that is, for $50,862.40. The proportion of this price applicable to the stock held on January 1, 1861, was $49,662.05. This was the amount first stated as its value in West Virginia's exhibit of the values of items in Class C; but, subsequently, in the course of the proceedings the claim that the stock should be valued at par was advanced. The Master estimated the value at $35,096.85, that is, taking the amount as of January 1, 1861, which would produce the above stated sum of $49,662.05 at the date of sale.

The evidence, as West Virginia concedes, is meager. There are no market quotations. It does not appear that any dividends had ever been paid or that any profits had ever been earned. There is no statement of assets and liabilities, of traffic conditions, or of the results of operation. There is little knowledge of the physical condition of the road. West Virginia's contention is that the stock should be valued at par upon the ground that this is presumed to be the value and that Virginia had paid for it at that rate.

Statements may be found to the effect that par value is *prima facie* actual value (*Appeal of Harris*, 12 Atlantic Reporter, 743; *Moffitt* v. *Hereford*, 132 Missouri, 513), but if such statements can be deemed to announce a comprehensive rule, to be applied in the absence of evidence as to the property and business

of the corporation, we cannot regard it as well founded. There is no such presumption of law and common experience negatives rather than raises such an inference of fact. We took this view in *Fogg* v. *Blair*, 139 U. S. 118, 127, when we criticized the supposition 'that the court, in the absence of averment or proof to the contrary, would assume that it (stock) was worth par, or had substantial value.' See also *Griggs* v. *Day*, 158 N. Y. 1, 23; *Warren* v. *Stikeman*, 84 App. Div. (N. Y.) 610; *Beaty* v. *Johnston*, 66 Arkansas, 529. Shares represent the proportionate interest of the shareholders in the corporate enterprise, and a rule that this interest in the absence of all supporting evidence should be taken as actually worth the par of the shares would be wholly artificial. There is no exigency in the administration of justice which requires or justifies such an extreme assumption.

In the present case, upon this record, it would be wholly improper to say that this stock was worth $993,248. Nor is there any evidence upon which we can ascribe value to it apart from the fact of the subsequent sale. West Virginia in claiming the credit had the burden of proving value, and it was not sustained save as value could be deduced from the amount of the proceeds. The exception must be overruled.

Item 8. Loan to Virginia & Tennessee Railroad Company.

In 1853 Virginia made loan to this company of $1,000,000, which was secured by mortgage. The loan was outstanding on January 1, 1861. In 1863, payments were made in Confederate money amounting to $886,685,—equal on a gold basis to $97,601.46. These payments the Board of Public Works of Virginia attempted to repudiate by its resolution of February 4, 1868, upon the ground that the Second Auditor of Virginia had no authority to receive them. That the moneys were returned is not clearly established. The Master finding no evidence of

the value of the loan aside from the fact that these payments had been made took their value (in gold), computed as of January 1, 1861, and allowed the sum of $84,799.90. West Virginia excepts upon the ground that the loan should have been taken at her valuation of $886,685.

The company was incorporated in 1836 under the name of the Lynchburg & Tennessee Railroad Company. In 1860 Virginia held stock of the par value of $2,270,525 and her holdings were subsequently increased to $2,300,000. It is urged that the book value of the shares on June 30, 1860, was 99.90, but we have no statement of assets and liabilities or of net earnings. The only year for which the result of operation is given (the one preceding June 30, 1860) showed a loss. It does not appear that any dividends were paid prior to 1864, and then Virginia received $138,000, which the Master figures as being equivalent in gold to one-half of one per cent.

In 1861 interest had accumulated upon the loan above mentioned to the amount of $280,000. Between 1861 and 1863 payments were made aggregating this amount in Confederate currency, the gold equivalent being $91,986.33. This accrued interest was made the subject of separate claim by West Virginia and was allowed in Class D at the value (in gold) of the payments, as of January 1, 1861, that is, $86,133.63. And to this finding there is no exception.

In 1870 Virginia transferred her stock in this road and whatever interest she had in the loan, together with her interest in other stocks and loans, to the Atlantic, Mississippi & Ohio Railroad Company for $4,000,000, secured by a second mortgage for that amount, subject to a first mortgage of not more than $15,000,000 which was to provide for existing liens, new construction and repairs and improvements. The payment of the $4,000,000 was to be in instalments of $500,000 each, the first of which was to

be made fifteen years later, in 1885. In addition to the stock and loan of the Virginia & Tennessee Railroad Company, there were embraced in this sale by Virginia 12,000 shares of the stock of the Norfolk & Petersburg Railroad Company, together with her claim for the unpaid balance ($163,000), and interest, of a loan of $300,000 to that company; 1,034 shares of the stock of the Virginia & Kentucky Railroad Company; and 8035 shares of the stock of the South Side Railroad Company with the claim of the State upon an outstanding loan by the latter of $800,000. This last-mentioned loan (to the South Side Railroad Company) constitutes Item 9 in Class C, and was found by the Master to be of no value; and to this ruling there is no exception. Both that loan and the one, now in question, to the Virginia & Tennessee Railroad Company, were included in the tabulation of the securities transferred but no value was assigned to them. The terms of the sale as the Master well says "are strongly indicative of an abortive, profitless enterprise." He adds that, "after the lapse of ten years, and the expenditure of approximately $5,000,000 of new money," it "again met with shipwreck, and the State was able to save as salvage from the wreckage, and that apparently through the grace of the first mortgagees, only the sum of $500,000 in 1882." In the absence of any satisfactory evidence of value with respect to the stocks thus transferred, the Master in connection with another item of claim to which we shall presently refer gave credit for this realization, discounted as of January 1, 1861, that is, for the sum of $204,688.42.

Upon this record, it certainly cannot be assumed that the loan to the Virginia & Tennessee Railroad Company was worth par, and in fact West Virginia has claimed on this item not par, but $886,685, the amount which was subsequently paid in Confederate currency. Apart from this payment, we find no basis whatever for an estimate of value as of January 1, 1861. The payment itself cannot

be taken for more than it was worth in gold and the Master in making his allowance on that basis went as far as the proof justified.

Item 10. Loan to Norfolk & Petersburg Railroad Company.

This is the loan which we have mentioned in connection with the sale in 1870 to the Atlantic, Mississippi & Ohio Railroad Company. At that time it appeared that the unpaid balance was $163,000. On January 1, 1861, the loan amounted to $300,000, and West Virginia contends that the face value should be allowed. The doubtful character of the claim is indicated by the fact that in one of West Virginia's exhibits the loan is scheduled with the statement under the head of 'Value,' January 1, 1861,—'No claim—too indeterminate.'

As already stated, Virginia held 12,000 shares of the stock of this company; but we have no facts with respect to its condition, property, or operation, which would enable us to assign a value to the stock as of January 1, 1861. No net earnings are shown and for the year preceding March 31, 1861, it appears that the road was operated at a large loss.

On this showing we cannot say that the loan was worth its face. There is, in fact, nothing to support a valuation, save the moneys realized. The sum of $137,000 was paid in two instalments in 1867 and 1868, and the remainder of $163,000, with certain accrued interest, entered into the realization of 1882. The value of the total amount thus obtained, calculated as of January 1, 1861, or $108,415.45, was allowed. We find no ground for any larger credit.

Item 17. Claim against the United States.

Virginia made advances to the Government in aid of the War of 1812. These apparently were refunded but there remained a question as to interest. Virginia insisted that there was a balance of interest due on July 1, 1814, amounting to $298,369.74 which she claimed with

interest from that date. On the other hand, the United States held bonds of Virginia (which had been purchased by the Government as trustee for certain Indian tribes) amounting to $581,800, and also held $13,000 of bonds of the Chesapeake & Ohio Canal Company, guaranteed by Virginia. A settlement was effected under the Act of May 27, 1902 (c. 887, 32 Stat. 207, 235), by which February 11, 1894, was selected as the date of adjustment and the interest was calculated to that date on each side at six per cent. In the case of Virginia's bonds, the interest ran from January 1, 1861. The total claim of Virginia amounted to $1,723,582.53, and that of the Government (after certain credits of interest received and with the addition of $16,923.70 which had been paid to the Restored State of Virginia) amounted to a total of $1,723,577.03. The difference on this adjustment was only $5.50, which was paid to Virginia in cash.

West Virginia asked that there should be allowed, as an asset of the undivided State, the amount of this claim of Virginia against the Government to the extent of the principal with interest to January 1, 1861, that is, $1,130,821.31,—to the end that West Virginia should receive in the final adjustment of its liability a credit of 23½ per cent. of this amount.

The Master noted that the mutual claims of Virginia and the United States had been adjusted as of a selected date (long past) when with interest they practically balanced each other. He concluded that this convenient method of ending the controversy did not necessarily involve a determination of the cash values of the claims upon either side. He decided not to allow West Virginia's claim by virtue of this settlement so far as it involved interest. He found, however, that the bonds of Virginia ($581,800) which entered into the settlement were embraced in the indebtedness which was to be apportioned. The Master thought, therefore, that as their full face value

was included in the aggregate of the debt with respect to which West Virginia was to be charged, an appropriate credit on their account should be made. For this purpose, he took the face of the bonds with the cash item of $5.50, or $581,805.50 in all, as received in 1903, and calculated the value of that sum as of January 1, 1861. This amount, to wit, $164,584.30, he allowed.

West Virginia excepts, insisting that the sum allowed should have been $1,130,821.31.

The proper disposition of this item, it would seem, is to treat the common asset as applied to the redemption of a portion of the common debt. That is, the claim of Virginia against the United States was devoted to the payment of the bonds of Virginia amounting to $581,800, which formed a part of the debt to be divided. It is equitable that West Virginia being charged with her established share of the whole debt should be credited with the same share of the reduction thus accomplished. This will properly be effected by including the amount of the face value of these bonds in the total sum, on account of which as equitably applicable to the debt, West Virginia is to receive credit. We find no warrant for the diminution of this allowance through such a calculation as that made by the Master. Virginia's bonds, as has been said, constituted the principal of the Government's claim as it existed on January 1, 1861, and were discharged accordingly. What remained of Virginia's claim against the Government—that is, of the common asset—was exhausted in the payment of the interest subsequently accruing upon the common debt, and if any equity exists with respect thereto, it is one to be adjusted in the disposition of the question of interest.

It follows that upon the item now under consideration there should have been allowed the sum of $581,800 instead of $164,584.30, making a difference of $417,215.70.

4. *Class C. Item 19. Dividend bond, $149,984, of the*

Richmond, Fredericksburg & Potomac Railroad Company. The Master allowed this item at the face value.

The exception is taken by Virginia and the bondholding creditors upon the ground that the bond was paid in 1863 in Confederate money.

This, however, is not a case where there is resort to the subsequent realization as evidence of value. On the contrary, the railroad company, as the Master found, was operating at a profit. Its stock (Class B, *supra*), was valued at 117.43. The bond, upon the evidence, was a good asset at its face on January 1, 1861, and was properly valued as such in the same manner as the loans included in Class C, Items 1 to 4.

5. *Class E. Items 1 to 4, inclusive. Bank stocks.*

The shares embraced in these items and the values fixed by the Master are as follows:

Farmers' Bank of Virginia, 9,626 shares at 102.89,	$990,419.14
Bank of Virginia, 13,766 shares at 71.49,	984,131.34
Bank of the Valley, 4,839 shares at 102.6,	496,481.40
Exchange Bank, 8,755 shares at 102.2,	894,761.00

In each case the Master took the book value with a deduction of five per cent. The sole exception is by West Virginia, who contends that the full book value should have been allowed.

It is urged that Virginia continued to own the shares and that no process of liquidation was necessary. But the deduction did not proceed upon the view that an actual liquidation was required. The Master's conclusion was based upon the unassailable ground that the book value only represented the amount which, according to the books, could be obtained from the assets upon a liquidation; that hence the book value did not represent the actual net value of the shares; and that this actual value could not be estimated without a proper allowance for the expense of realization. He made this allowance upon a

basis sustained by the evidence, and there is no reason for disturbing his finding.

6. *Class F. Securities sold to the Atlantic, Mississippi & Ohio Railroad Company.*

These embraced the stocks to which reference has been made in the discussion of Items 8 and 10 of Class C, *supra*. The Master, as stated, allowed for these—$204,688.42. West Virginia excepts because the Master did not allow either the book value of $4,276,044.39 or the sum of $4,000,000 for which the second mortgage, already mentioned, was given at the time of the sale in 1870. We have commented upon the lack of evidence with respect to the value of the shares of the Virginia & Tennessee Railroad Company and the Norfolk & Petersburg Railroad Company, two of the four companies in question; and also upon the fact that in the case of the third company, the South Side Railroad Company, a loan of $800,000 outstanding on January 1, 1861, was found by the Master to be of no value and no exception has been taken to the finding. With respect to both the company last mentioned and the remaining company, the Virginia & Kentucky Railroad Company, as well as in the case of the two others, the record discloses no facts with respect to condition, assets and liabilities, and results of operation, which can be deemed to furnish any adequate ground for a conclusion as to actual worth. The schedule of 1870, at the time of the transfer of these stocks to the Atlantic, Mississippi & Ohio Railroad Company simply gives par values and, as has been said, the purchaser of these stocks, and other items, executed therefor a second mortgage for $4,000,000 payable in annual instalments of $500,000 each, the first payment being postponed until 1885. We find in this transaction no proper basis for a valuation as of 1861. Notwithstanding the expenditure of large amounts upon the properties, the second mortgage proved to be worthless except for the sum of $500,000 paid in 1882

on the foreclosure of the first mortgage, and this payment it would seem was not based upon the actual value of the property but was rather in the nature of a concession to assure a complete title without controversy. There is no warrant in the evidence for any greater allowance than that which the Master gave.

7. *Class G. Stock of the James River & Kanawha Company.*

The State held $10,400,000, in par value, of this stock, or 91.77 per cent. of the entire capital stock, at a total cost of $9,547,582.21. The Master allowed as its value $1,664,333. The exception is by Virginia, and the bondholding creditors, it being insisted that the stock had no value.

The record contains voluminous reports, statistics and testimony, with respect to this historic enterprise, showing the facts as to its development, the property which the company owned, and the course of its business. It would be almost impossible briefly to review these facts, and their recital at length would serve no useful purpose. The capital, as has been said, was mainly supplied by the State and by January 1, 1861, there had been completed approximately one hundred and ninety-five miles of the canal, from Richmond to Buchanan, with a branch of twenty-two miles to Lexington. There had been no dividends, save one of $10,092 in 1836. In addition to the original investment in the stock, there had been an increasing indebtedness to the State which amounted in the year 1860 to $7,560,214.44. As the company was unable to earn sufficient to pay the interest upon this indebtedness, the State under the Act of March 23, 1860, provided for an increase of capital stock and took in satisfaction of its debt (and to make specified provision for floating debt) 74,000 shares in six per cent. preferred stock. Upon the assumption that this exchange had been effected and that the debt of the State had been converted into capital,

eliminating the interest charge, it appeared that the net operating revenue in 1860 amounted to $151,000.14. If computed on the same basis, it appeared that the average annual net operating revenue for seven years, including 1860, would have been $115,554.21, and for twenty-five years, $111,800. It seems, however, that there were certain outstanding bonds amounting to $199,000 upon which the company was liable, and that to get the net earnings, exclusive of any return to the State, it would be necessary to deduct the annual interest upon this sum, that is, $11,940. The Master concluded that upon the evidence the only basis for computation of value was to take the average net returns for twenty-five years ($111,800), deducting this interest ($11,940), or $99,860. Capitalizing these earnings at six per cent. the value of the property was fixed at the sum above stated, to wit, $1,664,333. The Master thought that this estimate was a liberal one in view of the fact that the computation did not make allowance for depreciation, and of the diminished returns of the succeeding years. But the basis chosen seemed to be the only one upon which he could reach a reasonable conclusion. In view of the property shown to have been owned by the company, and the evidence as to the results of operation, we think that the exception of Virginia and the bondholding creditors cannot be sustained and that the Master's appraisal should be accepted.

That West Virginia, after this painstaking investigation, was not dissatisfied with the result is apparently shown by the fact that in filing its exceptions to the Master's report, it took no exception to his finding as to this item. In its brief, however, in discussing Virginia's exception, West Virginia states that it 'now excepts' to the Master's finding because of his failure to allow $2,516,666 instead of $1,664,333. While this might not be regarded as a formal exception which should receive consideration, we should

not be disposed to ignore it if it had merit, but should consider the objection in the same untechnical spirit in which the controversy has been dealt with from the beginning. But we do not think that the exception is well taken. The suggested value is reached by capitalizing the net operating revenue of a single year, that is, by taking the return for 1860 at the amount above stated, $151,000.14, which on a six per cent. basis would give a value of $2,516,666. This, however, makes no allowance for the interest charge of $11,940; and, further, we think it would be wholly unjustifiable in the light of the history of this company to capitalize upon the return of one year. It is objected, however, that the Master reached his result by taking the average net returns for a period of twenty-five years which included the early years of the undertaking, but if we take the net returns of seven years preceding September 30, 1860, as shown by the exhibit prepared by West Virginia's accountant, or $115,554.21, and deduct the interest charge of $11,940, there remains $103,614.21 as the annual net profit, exclusive of any return to the State. This sum capitalized at six per cent. would show a value of $1,726,903, a sum very slightly in excess of the Master's estimate. Having regard to the absence of allowance for depreciation, it cannot be said that West Virginia is entitled to have the estimate increased.

8. *Class G. Stock of the Manassas Gap Railroad Company.*

Virginia owned $2,105,000 of this stock in par value, out of a total of $3,322,164.67. The Master found no evidence upon which he could assign a value to this stock, and West Virginia excepts insisting that it should have been estimated to be worth par.

In the supplemental answer, a value was placed upon the stock at 25 per cent. of the par value in view of the lapse of time and the lack of clear evidence as to actual

value. Even this, however, cannot be regarded as more than a conjecture. It was shown before the Master that the road had been operated as far as Mt. Jackson and was in course of construction to Harrisonburg, but no satisfactory data were furnished as to the condition of property, liabilities, earnings, etc., upon which any finding of value could properly be made. It is, therefore, suggested that in the absence of proof to the contrary the stock should be presumed to be worth par, but, as already stated, no such assumption is justified. There was a failure of proof as to this item and the Master properly disallowed it.

9. Under her general exception, West Virginia raises two further objections which affect the credits to be allowed.

(1) It appeared that certain counties in West Virginia, after the organization of the State, paid taxes, fines, etc., to Virginia amounting to $180,264.45. Credit for this was asked by West Virginia, but was refused by the Master. He found that the circumstances under which this amount was assessed were 'involved in a great deal of doubt and uncertainty.' It appeared that a balance could not fairly be struck with respect to the sums thus paid without taking into consideration the expenses of the actual government of the counties in question for the maintenance of which it was raised. As the Master says: "The amount" (of these expenses) "however was not known. It may have been more, it may have been less than the amount paid in taxes." The record does not furnish any ground for the allowance of this item.

(2) The Master concluded that if West Virginia were credited with her proportionate share of the assets which have been valued, she should be charged with the moneys and securities which she received from the Restored Government of Virginia, to wit, $170,771.46 in money, and $370,696.30 in securities, making a total of $541,467.76. West Virginia makes no objection to the charge of the

securities but excepts to the ruling as to the money. There seems to be no doubt that the money was in fact received from the Restored Government of Virginia, and that it was money belonging to Virginia which was turned over to the new State. It would seem to be clearly equitable that, if the credits in question are allowed, this charge should be made.

10. The further exception is taken by the bondholding creditors (not by Virginia) to the failure of the Master to hold that Virginia was entitled to apply the assets, thus valued, to various obligations not embraced in the principal debt which, as heretofore determined, is to be apportioned. The contention thus urged is but a repetition in another form of the arguments which have already been considered in reaching the conclusion that these assets should be regarded as specifically dedicated to the discharge of the indebtedness to be apportioned, and that West Virginia in assuming an equitable proportion of that indebtedness was entitled to a credit accordingly. The exception cannot be sustained.

All the exceptions relating to the credits in question have now been considered. The values as thus ascertained are:

Class A		$ 819,250.03
Class B		323,167.36
Class C		
Allowed by Master	$7,352,594.65	
Increase in Item 17	417,215.70	7,769,810.35
Class D		345,554.80
Class E		3,802,357.48
Class F		204,688.42
Class G		1,664,333.00
TOTAL		$14,929,161.44

Credit to West Virginia of 23½ per cent. of $14,929,161.44	$ 3,508,352.94
Less money and securities received by West Virginia from Restored Government of Virginia as found by Master.	541,467.76
Net credit to West Virginia	$ 2,966,885.18

This would give as West Virginia's equitable proportion of the principal debt the sum of $4,215,622.28, as follows:

23½ per cent. of principal debt ($30,563,861.56) to be apportioned	$ 7,182,507.46
Deduct credit to West Virginia, as above	2,966,885.18
West Virginia's share of principal debt	$ 4,215,622.28

Interest. There remains the question of West Virginia's liability for interest.

This liability is contested upon the grounds that the claim of Virginia has been unliquidated and indefinite, that interest is not recoverable as damages save on default in the payment of an amount which is certain or susceptible of ascertainment, that there was no promise on the part of West Virginia to pay interest, that unearned interest was not a part of the debt of which she agreed to assume an equitable proportion, and that in the absence of an express promise interest is not to be charged against a sovereign State.

All the questions thus raised may be resolved by the determination of the fair intendment of the contract itself. If liability for interest is within the scope of the agreement no objection can lie on the ground of uncertainty in amount, as the promise attaches to the amount found to be payable. In this view, also, no question would be involved as to an award of interest by way of damages as distinguished from a recovery by virtue of the terms of the

undertaking. Nor can it be deemed in derogation of the sovereignty of the State that she should be charged with interest if her agreement properly construed so provides. The fundamental question is, What does the contract mean?

This subject has been discussed elaborately—from every possible point of view—in the comprehensive arguments which have been presented, but the considerations which must be deemed to be controlling are clearly defined and may be succinctly stated.

The subject-matter of the contract was a 'public debt.' That debt consisted of outstanding bonds. Some of these were redeemable at pleasure; but for the most part they were unmatured and had many years to run. These bonds provided for the payment of interest as well as principal; they were interest-bearing obligations. It is true that on January 1, 1861, there was interest due and unpaid, and apparently there were also some matured bonds; but these amounted to but a small fraction of the 'public debt.' The debt to which the parties referred,—as it existed prior to and on January 1, 1861,—was not a debt in the sense of a specific sum then due and payable, but manifestly was the liability evidenced by the outstanding obligations of which the promised interest was an integral part.

This being the subject-matter of the agreement, its express words have a clear significance. It was provided that West Virginia should '*assume*' her equitable proportion of the public debt. This was not an undertaking simply to pay a percentage of principal. West Virginia was to take upon herself a just share of the public burden represented by the bonds, and we cannot regard this provision as subject to an unexpressed limitation that interest should be excluded. A contract to assume an interest-bearing debt means the taking over of the liability for interest as well as principal. And the same is true *pro*

tanto of the assumption of an 'equitable proportion' of the debt. Both parties unquestionably contemplated that interest would accrue upon these bonds. They were making provision for payment and not looking to default. Certainly, Virginia was not expected to bear the burden of the interest accruing on the share to be taken by West Virginia. The very purpose of the contract was to secure—as between these parties—Virginia's exoneration with respect to that share. As it was plainly not the intention either that the bondholders should go without interest as to the proportion assumed by West Virginia, or that there should be left with Virginia the entire burden of meeting the interest on the outstanding bonds while the principal was apportioned, it must follow that the assumption of an equitable share by West Virginia related to the liability for both principal and interest. We cannot read the contract otherwise.

Nor do we think that in the construction of the provision of the constitution of West Virginia (Art. VIII, § 8), which defines her engagement, the second clause can be ignored. After stating that an 'equitable proportion' of the public debt shall be assumed by West Virginia, it is provided that 'the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years.' If there could otherwise be any doubt as to what was embraced in the contract of assumption, this provision would dissipate it. It is true, as we have said, that this direction to the legislature did not undo the contract by making 'the representative and mouthpiece of one of the parties the sole tribunal for its enforcement.' But it throws a clear light upon what the parties had in mind. The 'accruing interest' had not escaped their attention. And it was because the payment of accruing interest was an essential part of the obligation to be as-

sumed in the division of the 'public debt,' that the legislature was enjoined to establish an adequate fund by which the assumed liability in its full scope would be discharged.

The lapse of time has not changed the substance of the agreement. It is not necessary to review the history of the intervening years or to pass upon the contentions of the parties with respect to responsibility for delay. The contract is still to be interpreted according to its true intent, although altered conditions may have varied the form of fulfilment. It is urged that there are equities to be considered, but we can find none which go so far as to destroy the claim. On the contrary, there is no escape from the conclusion that there was a contract duty on the part of West Virginia to provide for accruing interest as a part of the equitable proportion assumed, and that it would be highly inequitable as between the two States that Virginia as to her share should bear interest charges for these fifty years while West Virginia on her part should simply pay a percentage of principal reduced by the credits which have been allowed.

While liability for interest exists, there is still the question as to the rate at which interest should be allowed. Virginia, it appears, has not paid upon her estimated share the rate which was reserved in the bonds. This fact, we think, raises an equity demanding recognition. In fixing West Virginia's share of the principal, we took into account the fact that Virginia, by the consent of the creditors, had reduced her own share below the amount which it would have been upon the basis we found to be correct, and we gave appropriate credit to West Virginia on account of this difference. 220 U. S., p. 35. And it would not be proper to hold West Virginia to the rate of interest specified in the bonds when Virginia as to her share has made arrangement with the creditors for a lower rate. The provision that the share of West Virginia shall be an equitable proportion is the dominating principle of the

award, and while Virginia as we have held is entitled to enforce the contract, in the due performance of which her honor and credit are concerned, her action with respect to her own estimated share must be taken into consideration.

In 1866, the General Assembly of Virginia provided for the funding of unpaid interest, on bonds issued prior to April 17, 1861, in bonds bearing the same rate of interest. It appears in the evidence that the bonds issued under this act for unpaid interest amounted to $6,576,913.60. It is also stated on behalf of Virginia that there was paid in cash from January 1, 1861, to December 31, 1871, on account of interest, the aggregate sum of $7,094,103.61, making a total of $13,671,017.21. Of these cash payments, $4,519,065.04 were paid in Confederate currency between January 1, 1861, and April 1, 1865, the equivalent of which in gold is stated to be $2,261,358.91, making the total money payments for interest during this period on a gold basis equal to $4,836,397.48.

By the Act of March 30, 1871, Virginia, assuming that the equitable share of West Virginia was about one-third, made provision for the issue of new bonds which, as the bill in the present case sets forth, were to be "for two-thirds of the principal, and for two-thirds of the past due interest, and also for two-thirds of the interest on that accrued interest," which accrued interest to the extent above mentioned had been funded in bonds issued after the War. The new bonds were to bear interest at the same rate as the old bonds,—for the most part, six per cent. For the remaining one-third, there was to be issued upon the surrender of the old bond, a certificate of even date with the new bond setting forth the amount which was not funded, that payment with interest would be provided for in accordance with such settlement as should be made between Virginia and West Virginia, and that the old bonds so far as unfunded were held 'in trust for the holder or his assignees.' Under this act as was said

in *Hartman* v. *Greenhow*, 102 U. S. 672, 679, "a large number of the creditors of the State, holding bonds amounting, including interest thereon, to about thirty millions of dollars, surrendered them and took new bonds with interest coupons annexed for two-thirds of their amount and certificates for the balance." It should be added that it appears that there were certain bonds aggregating $864,842.03 in principal, which were held by educational institutions in Virginia, for which Virginia issued new bonds in full without deducting one-third for West Virginia's share. It is testified that upon these last-mentioned bonds six per cent. interest has been paid continuously.

As it appeared that even under the measure of 1871 Virginia had assumed a heavier burden than she felt able to bear, other plans were attempted for the settlement of the state debt. By the Act of March 28, 1879, the effort was made to accomplish a refunding upon the basis of fifty per cent. of accrued interest and one hundred per cent. of principal (of Virginia's estimated share) in new bonds payable in forty years (and redeemable after ten years) with interest at three per cent. for ten years, four per cent. for twenty years, and five per cent. for ten years. Under this statute, the two-thirds' basis was maintained and those making the exchange, in cases where certificates for the remaining one-third had not already been issued, were to receive certificates like those authorized by the Act of 1871.

While there was a refunding to some extent upon this basis, the legislation of 1879 very largely failed to accomplish its purpose, and another attempt was made under the Act of February 14, 1882. By this, the outstanding bonds were divided into classes. For those which had been issued under the Act of 1871, new bonds were authorized on the basis of fifty-three per cent. of principal and one hundred per cent. of accrued interest. The act recited that the net revenues of the State did not warrant

the assumption of a larger rate of interest than three per cent. upon the full amount of Virginia's equitable share of the old debt as the same was ascertained and formally declared by an account set forth in the preamble,—an account stated on the two-thirds' basis. The new bonds were for fifty years (redeemable after July 1, 1900) with interest at three per cent. until paid.

As shown by the account contained in this act, the payments in money from January 1, 1861, to July 1, 1871, for interest, amounted to $7,256,723.66.[1] In this account, the entire amount thus paid was credited against the two-thirds of the accrued interest (or interest on two-thirds of the principal) which Virginia had estimated to be her equitable share. The interest on this share exceeded these payments. It also appeared that between 1863 and 1871 bonds had been redeemed to the amount of $3,710,449.67 and this amount was credited against Virginia's two-thirds of principal. The statement of account was made for the purpose of explaining and justifying the attempted readjustment.

The plan of 1882 proved abortive. New bonds to a considerable amount were issued under its provisions, but the bondholders for the most part refused to accede to its terms and apparently there were outstanding on February 20, 1892 (unfunded under the Act of 1882) about $28,000,000 of principal and interest (to July 1, 1891), that is, as representing Virginia's assumed proportion. On that date an act was passed by the General Assembly which provided for the refunding of these bonds on the basis of nineteen-twenty-eighths of the principal and accrued interest (as of July 1, 1891) in new bonds bearing two per cent. interest for ten years and three per cent. until paid. The bonds were to be for one hundred years, and were redeemable after July 1, 1906. The refunding was carefully limited

[1] Of this total, the sum of $3,662,434.55 is stated as having been paid from January 1, 1861, to July 1, 1863, and the amount paid from July 1, 1863, to July 1, 1871, is given as $3,594,289.11.

to the two-thirds' basis and certificates were to be issued for the remaining one-third similar to those above described. In 1894 provision was made for further time for an exchange on the stated basis, which however was not to be extended beyond the end of the year. There were additional bonds, said to amount to over $2,400,000, held by educational corporations, which were refunded under a statute passed February 23, 1892, in new obligations for their full amount of principal and interest.

Under this legislation the refunding was accomplished. Virginia alleges in her bill that "at length a final and satisfactory settlement of the portion of the debt of the original State which Virginia should assume and pay was definitely concluded by the Act of February 20, 1892."

In the light of this financial history, we come to the consideration of Virginia's payments. It is stated on behalf of Virginia that the amount of interest paid by her from January 1, 1861, to September 30, 1913 (the latest date to which the calculation has been made), amounted to $41,071,219.02. Taking Virginia's share of principal at the amount assumed by her, as computed in our former decision (220 U. S., p. 35), that is, $22,598,049.21 (an amount somewhat less than her true proportion of the total debt of January 1, 1861), the total interest paid as above stated, would be the equivalent of simple interest upon that principal at a rate somewhat less than three and one-half per cent.

But these payments on account of interest did not include bonds that had been retired, and Virginia's exhibit shows that in addition to these payments she had 'paid off and retired' (down to September 30, 1913) bonds amounting to $12,141,591.49; and that, further, her new bonds issued for the portion of the old debt, funded and assumed by her, and outstanding on September 30, 1913, amounted to $24,645,075.23. These items including the item of interest first mentioned make a total of

$77,857,885.74. We have in this aggregate the amounts paid by Virginia on account of the old debt to the date mentioned. If from this total we deduct the amount of Virginia's assumed share of principal, as above computed ($22,598,049.21), the remainder would be $55,259,836.53; or, if all payments of interest were put on a gold basis, $53,002,130.40. If we treat this entire sum as applicable to interest—and to interest upon Virginia's assumed share alone—it would be the equivalent of simple interest upon the principal stated, from January 1, 1861, to September 30, 1913, at a rate a little less than four and one-half per cent.

It is manifestly impracticable, and it would not be equitable, to apply rates of interest in the present determination which would follow the details of Virginia's financial arrangements. The amounts included in the total of Virginia's payments represent large sums paid as interest upon interest. West Virginia's equitable proportion should not be increased by a rate based upon successive allowances of compound interest.

But in the light of the facts that have been recited a fair basis of adjustment may be fixed.

It will be observed that the amount of the new bonds shown by Virginia's statement to be outstanding on September 30, 1913, was slightly in excess of her assumed share of principal as computed. That is, Virginia through the successful operation of the Act of 1892 (which provided for a refunding as of July 1, 1891), taken with what had been effected under the Act of 1892, placed an amount substantially equal to her assumed share of principal upon a permanent basis of three per cent. There appears to be an exception to this in the case of certain securities, but their amount is relatively small. Virginia's creditors may have been induced to accept this adjustment, and the low rate it involved, by reason of the inclusion of unpaid interest in fixing the principal of the new bonds. But, on the other hand, the total of the principal and in-

terest then outstanding was largely reduced in the refunding, and the rate of interest upon the new bonds under the Act of 1892 for the first ten years was made two per cent. The reduction, and the ten years' rate, may well be regarded as offsetting the advantage derived from including in the face of the new obligations whatever excess there may have been over the assumed share of Virginia as computed.

Taking all the facts into consideration, we reach the conclusion that in fixing the equitable proportion of West Virginia, her part of the principal should be put on a three per cent. basis, as of July 1, 1891; that is, that interest should run at that rate from that time. For the preceding period, from January 1, 1861, to July 1, 1891, there is greater difficulty. In recognition of the amounts paid by Virginia upon her share, but also having in mind the payments of compound interest attributable to her own exigency, the nearest approach to complete justice will be had by allowing interest at four per cent.

This, we are satisfied, will adequately recognize and enforce the equities of both States.

Upon this basis, West Virginia's share of the debt will be:

Principal, after allowing credits as stated,		$4,215,622.28
Interest,		
January 1, 1861, to July 1, 1891, at four per cent. .	$5,143,059.18	
July 1, 1891, to July 1, 1915, at three per cent..	3,035,248.04	8,178,307.22
		$12,393,929.50

For convenience the calculation of interest has been made to July 1, 1915. In the decree the calculation will be at three per cent. per annum from July 1, 1891, to the date of entry. The decree will also provide for interest at the rate of five per cent. per annum upon the amount awarded, until paid.

Costs to be equally divided between the States.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY *v.* CONARTY, ADMINISTRATRIX.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 166. Submitted March 3, 1915.—Decided June 14, 1915.

Where a duty is imposed for the protection of persons in particular situations or relations, a breach of it which happens to result in injury to one in an altogether different situation or relation, is not, as to him, actionable.

The evils against which the coupler provisions of the Safety Appliance Act are directed are those which attended the old fashioned link and pin couplings where it was necessary for men to go between the ends of the cars to couple and uncouple them: it was not enacted to provide a place of safety between colliding cars.

An employé of a railroad company not endeavoring or intending to couple or uncouple a car or to handle it in any way but riding on an engine that collided with it, is not in a position where the absence of a coupler and drawbar prescribed by the Safety Appliance Act operates as a breach of duty imposed by that Act for his benefit.

106 Arkansas, 421, reversed.

THE facts, which involve the construction and application of the Safety Appliance Act in an action for injuries based upon the Employers' Liability Act, are stated in the opinion.

Mr. W. F. Evans and *Mr. Thomas P. Littlepage*, with whom *Mr. B. R. Davidson* was on the brief, for plaintiff in error:

The cause should have been removed to the Federal court. *Gains* v. *Fuentes*, 92 U. S. 10, 17; *Gavin* v. *Vance*, 33 Fed. Rep. 84, 85; *In re Woodbury*, 98 Fed. Rep. 833, 837; *Harrison* v. *St. L. & S. F. R. R.*, 232 U. S. 318; *Martin* v. *Hunter*, 1 Wheat. 304, 327; *Reagan* v. *Farmers L. & T. Co.*, 154 U. S. 362, 391; *Robertson* v. *Baldwin*, 165 U. S.

275, 279; *Sharon* v. *Terry*, 33 Fed. Rep. 337, 355; *State* v. *Coosaw Mining Co.*, 45 Fed. Rep. 804, 810; *Van Brimmer* v. *Tex. & Pac. Ry.*, 190 Fed. Rep. 394, 399.

The coal car had been withdrawn from commerce. *C. & N. W. R. R.* v. *United States*, 168 Fed. Rep. 236; *Delk* v. *St. L., I. M. & S. Ry.*, 220 U. S. 580, 585; *Erie R. R.* v. *United States*, 197 Fed. Rep. 287; *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473; *Nor. Car. R. R.* v. *Zachary*, 232 U. S. 248; *Siegel* v. *N. Y. C. & H. R. R.*, 178 Fed. Rep. 873; *Southern Ry.* v. *Snyder*, 187 Fed. Rep. 492, 497; *Taylor* v. *Bos. & Me. R. R.*, 188 Massachusetts, 390; *United States* v. *Erie Ry.*, 212 Fed. Rep. 853, 855; *United States* v. *Louis. & Nash. R. R.*, 156 Fed. Rep. 195; *United States* v. *Rio Grande & W. Ry.*, 174 Fed. Rep. 399.

The absence of the coupler was not the proximate cause of injury. *A., T. & S. F. Ry.* v. *Calhoun*, 213 U. S. 1; Beach on Con. Neg. (2d ed.), § 31; Broom's Legal Maxims, § 215; *C., B. & Q. Ry.* v. *Richardson*, 202 Fed. Rep. 836; Cooley on Torts, pp. 68–71; *Cole* v. *G. S. & L. Soc.*, 124 Fed. Rep. 113; 3 Elliott on Railroads (Original ed.), § 1310; *Gill* v. *Railway Co.*, 160 Fed. Rep. 260; *Gilbert* v. *Railway Co.*, 128 Fed. Rep. 529; *Henry* v. *St. L., K. C. & N. Ry.*, 76 Missouri, 288, 293–4; *Logan* v. *Railway Co.*, 129 S. W. Rep. 575; *Lyddy* v. *Louis. & Nash. R. R.*, 197 Fed. Rep. 524; *Midland Valley Ry.* v. *Fulgham*, 181 Fed. Rep. 91; *Pennell* v. *Penna. R. R.*, 231 U. S. 675, 679; Ray's Negligence of Imposed Duties (Personal), 133; Shearman & Redfield on Negligence (5th ed.), §§ 25 and fol.; *St. L., I. M. & S. Ry.* v. *McWhirter*, 229 U. S. 265, 280, 282; 1 Thompson's Comm. on Neg. (2d ed.), § 45; Webb's Pollock on Torts (Enlarged Am. ed.), 29; Watson on Damages for Pers. Inj., §§ 33–35; 1 White on Pers. Inj., §§ 20–39.

Deceased's negligence was cause of his death—assumption of risk. *Butler* v. *Frazee*, 211 U. S. 459, 465; *Gibson* v. *Ches. & Ohio R. R.*, 215 Fed. Rep. 27; *Ches. & Ohio R. R.*

v. *Hennessey*, 96 Fed. Rep. 713; *C., R. I. & P. Ry.* v. *Shipp*, 174 Fed. Rep. 353; *C., R. I. & P. Ry.* v. *Jackson*, 178 Fed. Rep. 832; *Erie Ry.* v. *Kane*, 118 Fed. Rep. 223; *Int. & Gr. N. Ry.* v. *Story*, 62 S. W. Rep. 130; *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473; *Ill. Cent. R. R.* v. *Hart*, 176 Fed. Rep. 245–247; *Jackson* v. *Mo. Pac. Ry.*, 104 Missouri, 448; *Riley* v. *Louis. & Nash. R. R.*, 133 Fed. Rep. 904; *Schweig* v. *C., M. & St. P. Ry.*, 216 Fed. Rep. 750; *Seaboard Air Line* v. *Horton*, 233 U. S. 492; *Southern Ry.* v. *Crockett*, 234 U. S. 725; *St. L. & S. F. R. R.* v. *Dewees*, 153 Fed. Rep. 56; *Suttle* v. *C. O. & G. Ry.*, 144 Fed. Rep. 668; *Tex. & Pac. Ry.* v. *Bousman*, 212 U. S. 536, 541.

The members of both crews were fellow servants. *Allen* v. *N. Y., N. H. & H. R. R.*, 174 Fed. Rep. 779; *Beutler* v. *Grand Trunk Ry.*, 224 U. S. 85; *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473.

With a safe and dangerous course open to him, deceased selected the dangerous one. *Hirsch* v. *F. B. Bread Co.*, 150 Mo. App. 162, 174; *Moore* v. *Railway Co.*, 146 Missouri, 572, 582; *Smith* v. *F. N. Box Co.*, 193 Missouri, 716.

Plaintiff, as the wife of deceased, was an incompetent witness. *Cash* v. *Kirkham*, 67 Arkansas, 318; *De Beaumont* v. *Webster*, 71 Fed. Rep. 226; *De Roux* v. *Girard*, 112 Fed. Rep. 89; *Jarvis* v. *Andrews*, 80 Arkansas, 277; *Luken* v. *L. & M. S. Ry.*, 248 Illinois, 377; *Morris* v. *Norton*, 75 Fed. Rep. 912; *Mut. Life Ins. Co.* v. *Watson*, 30 Fed. Rep. 653; *Nunely* v. *Becker*, 52 Arkansas, 520; *Page* v. *Burnstine*, 102 U. S. 664; *Park* v. *Lock*, 48 Arkansas, 133; *Rainwater* v. *Harris*, 51 Arkansas, 401; *Rush* v. *Prescott & N. W. Ry.*, 83 Arkansas, 210; *Williams* v. *Waldon*, 82 Arkansas, 138; *Wilson* v. *Edwards*, 79 Arkansas, 69; *Whitney* v. *Fox*, 166 U. S. 664.

The testimony of witnesses Daniel and Woolum was also incompetent. *Gutridge* v. *Mo. Pac. Ry.*, 94 Missouri, 468, 472–3.

Defendant's motion to require plaintiff to elect on which cause of action she would prosecute should have been sustained. Thornton, Fed. Empl. Acts (2d ed.), § 104; *Andrews* v. *Hartford &c. Ry.*, 34 Connecticut, 57; *American R. R.* v. *Berch*, 224 U. S. 547; *Casey* v. *Transit Co.*, 205 Missouri, 721; Cooley on Torts (2d ed.), 309; *Daubert* v. *Western Meat Co.*, 139 California, 480; *Edwards* v. *Gimbel*, 202 Pa. St. 30; 3 Elliott on Railroads, § 1375; *Fulgham* v. *Midland Valley Ry.*, 167 Fed. Rep. 660; *Fithian* v. *Railway Co.*, 188 Fed. Rep. 842; *Gulf, C. & S. Ry.* v. *McGinnis*, 228 U. S. 173; *Garrett* v. *Railway Co.*, 197 Fed. Rep. 715; *Hendrix* v. *Am. Exp. Co.*, 138 Kentucky, 704, 709; *Hartigan* v. *So. Pac. Ry.*, 86 California, 142; *Littlewood* v. *Mayor of New York*, 89 N. Y. 24; *Legg* v. *Britton*, 64 Vermont, 652; *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59; *Munro* v. *Dredging Co.*, 84 California, 515; *McCafferty* v. *Penna. Ry.*, 193 Pa. St. 339; *St. L., I. M. & So. Ry.* v. *Hesterley*, 228 U. S. 702; *Strode* v. *St. L. Transit Co.*, 197 Missouri, 616; Shearman & Redfield on Neg. (5th ed.), § 140; *Walsh* v. *Railway Co.*, 173 Fed. Rep. 494.

Mr. Samuel R. Chew for defendant in error:

Intestate was engaged in an act of interstate commerce. *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 383; *Pedersen* v. *Del., Lack. & W. R. R.*, 229 U. S. 149; *St. L., S. F. & T. Ry.* v. *Seale*, 229 U. S. 157; *Chicago Jct. Ry.* v. *King*, 169 Fed. Rep. 372.

The defective coal car was engaged at the time of the injury in interstate commerce. *Chicago, M. & St. P. Ry.* v. *Voelker*, 129 Fed. Rep. 522; *Southern Ry.* v. *United States*, 222 U. S. 100; *Delk* v. *St. L. & S. F. R. R.*, 220 U. S. 580; *Erie R. R.* v. *Russell*, 106 C. C. A. 160; *Johnson* v. *So. Pac. Co.*, 196 U. S. 1.

The coal car in question did not comply with the provisions of the Act of 1893 or of 1910.

As to the Act of 1910 see Sen. Rep. No. 250, 61st Cong.

2d sess., p. 3; *St. L., I. M. & So. Ry.* v. *Taylor*, 210 U. S. 281.

The intestate was not guilty of contributory negligence and did not assume risk of employment. See Employers' Liability Act of 1908, 35 Stat. 65.

Action for loss of service and pain and suffering of intestate survived to his personal representative under the amendment of 1910, and see *Mich. Cent. Ry.* v. *Vreeland*, 227 U. S. 59; *St. L. & S. F. R. R.* v. *Conarty*, 106 Arkansas, 421.

The defective condition of the coal car was proximate and primal cause of intestate's death, and the evidence of defendant in error was competent. *St. L. & S. F. R. R.* v. *Fithian*, 106 Arkansas, 491; *Giles* v. *Wright*, 26 Arkansas, 476; *United States* v. *Clark*, 96 U. S. 37; 1 Greenleaf, §§ 348–350.

The evidence of Woolum and Daniels was also competent. 1 Greenleaf, 14th ed., § 440; *Eastern Transp. Line* v. *Hope*, 95 U. S. 297; *West. Coal Co.* v. *Berberich*, 36 C. C. A. 368; *Washington* v. *Baillie*, 92 U. S. 331; *Union Ins. Co.* v. *Smith*, 124 U. S. 405; *Tex. & Pac. Ry.* v. *Watson*, 190 U. S. 23.

The trial court had jurisdiction. 36 Stat. 1094; *Mondou* v. *N. Y., N. H. & H. Ry.*, 223 U. S. 1; *Southern Ry.* v. *Smith*, 205 Fed. Rep. 360; *Yazoo & M. V. R. R.* v. *Wright*, 207 Fed. Rep. 281.

The instructions of the trial court as given were correct. *Mich. Cent. Ry.* v. *Vreeland*, 227 U. S. 59.

The writ of error was improperly granted, no Federal question was raised that has not been adjudicated. *Mich. Cent. Ry.* v. *Vreeland*, 227 U. S. 59; *Delk* v. *St. L. & S. F. R. R.*, 220 U. S. 580; *Johnson* v. *So. Pac. Co.*, 196 U. S. 1; *St. L., I. M. & So. Ry.* v. *Taylor*, 210 U. S. 281.

Mr. Edward J. White and *Mr. E. B. Kinsworthy* filed a brief as *amicus curiæ*.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action for personal injuries ultimately resulting in death, the right of recovery being based upon the Employers' Liability Act, April 22, 1908, c. 149, 35 Stat. 65; as amended April 5, 1910, c. 143, 36 Stat. 291, in connection with the Safety Appliance Acts, March 2, 1893, c. 196, 27 Stat. 531; April 1, 1895, c. 87, 29 Stat. 85; March 2, 1903, c. 697, 32 Stat. 943; April 14, 1910, c. 160, 36 Stat. 298. The injuries were received in a collision between a switch engine and a loaded freight car having no coupler or drawbar at one end, these having been pulled out while the car was in transit. The car was about to be placed on an isolated track for repair and was left near the switch leading to that track while other cars were being moved out of the way—a task taking about five minutes. At that time a switch engine with which the deceased was working came along the track on which the car was standing and the collision ensued. It was dark and an electric headlight on another engine operated to obscure the car until the switch engine was within 40 or 50 feet of it. The deceased and two companions were standing on the footboard at the front of the switch engine and when the car was observed his companions stepped to the ground on either side of the track, while he remained on the foot-board and was caught between the engine and the body of the car at the end from which the coupler and drawbar were missing. Had these appliances been in place they, in one view of the evidence, would have kept the engine and the body of the car sufficiently apart to have prevented the injury, but in their absence the engine came in immediate contact with the sill of the car with the result stated. The deceased and his companions, with the switch engine, were on their way to do some switching at a point some distance beyond the car and were not

intending, and did not attempt, to couple it to the engine or to handle it in any way. Its movement was in the hands of others. The car was loaded with freight moving from one State to another, the railroad company was engaged in interstate commerce and the deceased was employed therein at the time. He died from his injuries six days later leaving a widow and three minor children. The only negligence charged in the complaint was a failure to have the car equipped, at the end struck by the engine, with an automatic coupler and a drawbar of standard height as required by the Safety Appliance Acts, and there was no attempt to prove any other negligence. The plaintiff had a verdict and judgment for $10,000, and the Supreme Court of the State affirmed the judgment. 106 Arkansas, 421.

The principal question in the case is whether at the time he was injured the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with it would not have resulted in injury to the deceased. It therefore is necessary to consider with what purpose couplers and drawbars of the kind indicated are required, for where a duty is imposed for the protection of persons in particular situations or relations a breach of it which happens to result in injury to one in an altogether different situation or relation is not as to him actionable. *The Eugene F. Moran*, 212 U. S. 466, 476; *Gorris* v. *Scott*, L. R. 9 Ex. 125; *Ward* v. *Hobbs*, L. R. 4 App. Cas. 13, 23; *Williams* v. *Chicago & Alton R. R.*, 135 Illinois, 491, 498; *O'Donnell* v. *Providence & Worcester R. R.*, 6 R. I. 211;

Metallic Compression Co. v. *Fitchburg R. R.*, 109 Massachusetts, 277, 280; *Favor* v. *Boston & Lowell R. R.*, 114 Massachusetts, 350; *East Tennessee R. R.* v. *Feathers*, 78 Tennessee, 103; Pollock on Torts, 8th ed. 28, 198.

The Safety Appliance Acts make it unlawful to use or haul upon a railroad which is a highway for interstate commerce any car that is not equipped with automatic couplers whereby the car can be coupled or uncoupled "without the necessity of men going between the ends of the cars," or that is not equipped with drawbars of standard height—the height of the drawbar having, as explained in *Southern Ry.* v. *Crockett*, 234 U. S. 725, 735, an important bearing on the safety of the processes of coupling and uncoupling and on the security of the coupling when made. It is very plain that the evils against which these provisions are directed are those which attended the old-fashioned link and pin couplings where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars when coupled into a train sometimes separated by reason of the insecurity of the coupling. In *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 19, this court said of the provision for automatic couplers that "The risk in coupling and uncoupling was the evil sought to be remedied"; and in *Southern Ry.* v. *Crockett*, 234 U. S. 725, 737, it was said to be the plain purpose of the two provisions that "where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to standard." Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate "the necessity for men going between the ends of the cars. 27 Stat. 531."

We are of opinion that the deceased, who was not

endeavoring to couple or uncouple the car or to handle it in any way but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the Supreme Court of the State erred in concluding that the Safety Appliance Acts required it to hold otherwise.

Judgment reversed.

PENNSYLVANIA RAILROAD COMPANY *v.* MITCHELL COAL & COKE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 287. Argued May 14, 1915.—Decided June 14, 1915.

There being nothing in the record to show that any of the shipments involved in this case, in which the state court gave a judgment against the carrier for damages for discrimination in secret allowance of rebates to other shippers of like goods under the state law, were interstate shipments, and the court having found that all the shipments were intrastate, the judgment is affirmed.

241 Pa. St. 536, affirmed.

THE facts, which involve the validity of a judgment recovered in the state court by a shipper of coal for damages sustained through unlawful discrimination by the carrier in allowing and paying rebates to other shippers, are stated in the opinion.

Mr. Francis I. Gowen, with whom *Mr. F. D. McKenney* and *Mr. John G. Johnson* were on the brief, for plaintiff in error:

The judgment below should be reversed. See *Louisiana R. R. Comm.* v. *Tex. & Pac. Ry.*, 229 U. S. 336; *Mitchell*

Coal Co. v. *Penna. R. R.*, 230 U. S. 247; *Ohio R. R. Comm.* v. *Worthington*, 225 U. S. 101; *Penna. R. R.* v. *International Coal Co.*, 230 U. S. 184; *Tex. & N. O. R. R.* v. *Sabine Tram Co.*, 227 U. S. 111; *Union Stockyards Case*, 226 U. S. 286.

Mr. Joseph Gilfillan, with whom *Mr. George S. Graham* was on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This writ of error brings under review a judgment recovered by a shipper of coal for damages sustained through unlawful discrimination consisting in the secret allowance and payment of rebates to other shippers for whom the carrier was rendering a like and contemporaneous service. 241 Pa. St. 536. The action was brought and the judgment rendered under the law of the State and the complaint now made is that damages were awarded in respect of several shipments which were not intrastate but destined to points outside the State and as to which no recovery could be had in this action consistently with the Interstate Commerce Act. See *Mitchell Coal and Coke Co.* v. *Pennsylvania R. R.*, 230 U. S. 247. The plaintiff's statement of claim described the shipments as intrastate, that is, as made from one point to another in the State, and up to the time that the referee came to compute the damages it does not appear to have been questioned that all the shipments were of that class. A stipulation was then entered into specifying the number of tons shipped by the plaintiff during each of several periods and describing the shipments as made from the plaintiff's mines in Pennsylvania "to points within the State," but appended to the stipulation was a note wherein the defendant insisted that according to the evidence part of the shipments—those to Greenwich, Pennsylvania, "included coal

destined to points beyond the State" and that no recovery could be had in this action in respect of interstate shipments, and also a note on the part of the plaintiff controverting what was asserted in the defendant's note. The referee concluded that the shipments were all intrastate, and, while recognizing that some of the coal "might have been" re-shipped from Greenwich to places outside the State, said: "The plaintiff might have sold the coal at that place. To have moved the coal from Greenwich a new contract for carriage would have been necessary." The referee's conclusion was sustained by the trial court and by the Supreme Court of the State, the latter saying: "The shipments to Greenwich, Philadelphia, were intrastate, and hence were properly included in this action. They were consigned to plaintiff at Greenwich and there the contract of carriage between the plaintiff and the defendant was fully performed and ended. What disposition the plaintiff made of the shipments at Greenwich, whether it sold them or sent them within or beyond the State is immaterial as affecting the question whether as between the plaintiff and the defendant they were intrastate or interstate."

We find nothing in the record to sustain the contention that some of the shipments were interstate. While it appears that part of the coal was shipped from the mines to Greenwich, that the plaintiff there turned some of it over to other coal dealers, sold some of it outright and possibly re-shipped some to other places, it does not appear that any of it went out of the State, or, if it did, that the circumstances were such that its carriage from the mines to Greenwich was in fact but part of an intended and connected transportation beyond the State. See *Gulf, Col. & Santa Fe Ry.* v. *Texas*, 204 U. S. 403; *Ohio R. R. Commission* v. *Worthington*, 225 U. S. 101; *Texas & New Orleans R. R.* v. *Sabine Tram Co.*, 227 U. S. 111; *Louisiana R. R. Commission* v. *Tex. & Pac. Ry.*, 229 U. S. 336. The record

does not purport to contain all the evidence bearing upon this point, but it does show that in some of the exhibits the shipments included in the recovery were all listed and designated as "Coal—Intrastate." In this situation the conclusion reached by the state courts cannot be disturbed.

Judgment affirmed.

GENEVA FURNITURE MANUFACTURING COMPANY *v.* S. KARPEN & BROS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 496. Submitted December 17, 1914.—Decided June 14, 1915.

Where the plaintiff really makes a substantial claim under an Act of Congress, the District Court has jurisdiction whether the claim ultimately be held good or bad. *The Fair* v. *Kohler Die Co.*, 222 U. S. 22.

Jurisdiction is the power to consider and decide one way or the other as the law may require; it is not to be declined because it is not foreseen with certainty that the party invoking it may succeed.

Where a bill includes several causes of action, some arising under the patent laws and others on breach of contractual relations, and one of the defendants is a corporation that cannot be sued in the district without its consent, save in cases arising under the patent laws, the rule in equity respecting joinder of causes of action yields to the jurisdictional statute and, if the designated defendant objects to the jurisdiction, the bill must be dismissed, so far as that defendant is concerned, as to the causes of action not arising under the patent laws.

Whether in such a case all the causes of action may be maintained in a single bill as against the other defendants is a question of general equity jurisdiction and practice and is not open to consideration on direct appeal to this court under § 238, Judicial Code. *Bogart* v. *Southern Pacific Co.*, 228 U. S. 137.

THE facts, which involve the jurisdiction of the District Court in cases arising under the patent laws of the United States, are stated in the opinion.

Mr. Thomas A. Banning and *Mr. Samuel Walker Banning* for appellant:

The jurisdiction is conferred by bill for infringement.

The allegations if confessed or proven make out a case under the patent laws.

The facts show actual infringement through the procurement of the defendants.

No claim is made that all violations of a licensed contract constitute infringement.

The acts of the Seng Company procured by the defendants constitutes an infringement.

What the parties have agreed to shall constitute infringing devices.

An unauthorized use of the licensed devices is an infringement. See *Chadeloid Chemical Co.* v. *Johnson*, 203 Fed. Rep. 995; *Consolidated Rubber Co.* v. *Republic Rubber Co.*, 195 Fed. Rep. 770; *Fair* v. *Kohler Die Co.*, 228 U. S. 24; *Pope Mfg. Co.* v. *Owsley*, 27 Fed. Rep. 108; *United States* v. *Larkin*, 208 U. S. 338; *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. Rep. 425.

Mr. Levy Mayer, *Mr. Isaac H. Mayer*, *Mr. John H. Lee* and *Mr. Philip C. Dyrenforth* for appellees:

The bill of complaint showed no case under the patent laws, and the District Court therefore had no jurisdiction, inasmuch as an indispensable defendant was sued, over its protest, outside of the district of either its, or plaintiff's residence.

The District Court did not, under any circumstances, have jurisdiction to entertain that part of the bill seeking specific performance, because the court could not acquire jurisdiction over an indispensable defendant.

In support of these contentions see *Apapas* v. *United States*, 233 U. S. 587; *Bauer* v. *O'Donnell*, 229 U. S. 1; *Bement* v. *National Harrow Co.*, 184 U. S. 70; *Bogart* v. *Southern Pacific Co.*, 228 U. S. 137; *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339; *Brown* v. *Keene*, 8 Peters, 112; *Chadeloid Chemical Co.* v. *Johnson*, 203 Fed. Rep. 993; *Chappell* v. *United States*, 160 U. S. 499; *Colvin* v. *Jacksonville*, 158 U. S. 456; *Comptograph Co.* v. *Burroughs*, 175 Fed. Rep. 787; aff'd, 183 Fed. Rep. 321; *Courtney* v. *Pradt*, 196 U. S. 89; *Cushman* v. *Atlantis Pen Co.*, 164 Fed. Rep. 94; *Electric Boat Co.* v. *Lake Torpedo Boat Co.*, 215 Fed. Rep. 377; *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282; *The Fair* v. *Kohler Die Co.*, 228 U. S. 22; *Grace* v. *American Ins. Co.*, 109 U. S. 278; *Hanford* v. *Davies*, 163 U. S. 273; *Hartell* v. *Tilghman*, 99 U. S. 547; *Henry* v. *Dick*, 224 U. S. 1; *The Ira M. Hedges*, 218 U. S. 264; *Johnson* v. *Brass Co.*, 201 Fed. Rep. 368; *Keasby & Mattison Co.* v. *Cary Co.*, 113 Fed. Rep. 432; *King* v. *Inlander*, 133 Fed. Rep. 416; *Leschen* v. *Broderick*, 201 U. S. 166; *Marconi Wireless Tel. Co.* v. *National Co.*, 206 Fed. Rep. 295, 300; *Meckey* v. *Grabowski*, 177 Fed. Rep. 591; *Mitchell Coal Co.* v. *Penna. R. R.*, 230 U. S. 247; *Nat. Casket Co.* v. *New York Casket Co.*, 185 Fed. Rep. 533; *Nat. Coal Company* v. *C. & N. W. R. R.*, 211 Fed. Rep. 65; *Nat. Harrow Co.* v. *Hench*, 83 Fed. Rep. 36; *New Marshall Co.* v. *Marshall Engine Co.*, 223 U. S. 473; *Pope Mfg. Co.* v. *Owsley*, 27 Fed. Rep. 100; *Pratt* v. *Paris Gas Co.*, 168 U. S. 255; *St. Louis Mach. Co.* v. *Sanitary Flushing Co.*, 161 Fed. Rep. 725; *Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 446; *The Steamship Jefferson*, 215 U. S. 130; *Vose* v. *Roebuck Co.*, 210 Fed. Rep. 687; *S. C.*, 216 Fed. Rep. 523; *Wilson* v. *Sanford*, 10 How. 99; *Woerheide* v. *Johns-Manville Co.*, 199 Fed. Rep. 535.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a direct appeal under Jud. Code, § 238, from a decree dismissing a suit in equity for want of jurisdiction, the question for decision being whether the bill presents a case arising under the patent laws, that is, a case asserting some right or privilege under those laws which will be sustained by one construction of them or defeated by another. Although not a model of good pleading, the bill plainly shows, when all of it is considered, that it is intended to charge the defendants (a) with contributing to the infringement of letters patent belonging to the plaintiff by wrongfully inducing and persuading designated licensees of the plaintiff to make, use and sell devices embodying the inventions of the patents in circumstances not authorized or permitted by their licenses; (b) with wrongfully procuring such licensees to violate their license contracts in designated particulars, some of which have no bearing on the charge of infringement, and (c) with refusing to perform stipulations whereby the defendants agreed to assign to the plaintiff certain other letters patent. The prayer is for an injunction and accounting in respect of the contributory infringement, for an injunction and damages in respect of the procured breach of the licensees' contractual obligations, and for the specific performance of the stipulations to assign the other letters patent. The plaintiff is described as a New York corporation, one of the defendants as a West Virginia corporation, another as an Illinois corporation, and the third as an individual citizen of the latter State. The West Virginia company is alleged to have a regular and established place of business in the Northern District of Illinois, and the acts of infringement and contributory infringement are charged to have been committed in that district. Then there is an allegation that the suit is one "arising under the patent

laws of the United States, and also between citizens of different States," and that the amount in controversy exceeds $3,000, exclusive of interest and costs.

If the suit be one arising under the patent laws the District Court undoubtedly had jurisdiction, Jud. Code, § 24, par. 7, and §§ 48 and 256, but if it be not such a suit that court was obviously without jurisdiction as respects the West Virginia company, unless it chose to waive its privilege of being sued only in the district of its residence or that of the plaintiff. § 51. Appearing specially, that company objected that the suit was not one arising under the patent laws and insisted upon its personal privilege. The objection was sustained. The other defendants, likewise appearing specially, objected that the suit did not arise under the patent laws, and could not proceed without the presence of the West Virginia company because it was an indispensable party. This objection also was sustained, and the bill was then dismissed, the decree reciting that the dismissal was for want of jurisdiction.

We think the bill plainly rests the first branch of the suit, that relating to the alleged contributory infringement of the plaintiff's patents, upon the patent laws and asserts in effect, if not in exact words, that the infringing acts charged against the defendants constitute an invasion of the plaintiff's exclusive rights under those laws and entitle it to relief thereunder by injunction and a recovery of profits and damages. And we think it cannot be said of this branch of the case that it is so unsubstantial or devoid of merit as to make it frivolous or to bring it only nominally within the patent laws. On the contrary, we think it presents a real question under them. Whether it shall finally prevail or fail, it has enough of substance to entitle the plaintiff to an adjudication of it as presented. Thus it is within the ruling in *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25, that "if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction

whether the claim ultimately be held good or bad." Jurisdiction, as pointed out in that case, is the power to consider and decide one way or the other, as the law may require, and is not to be declined merely because it is not foreseen with certainty that the outcome will help the plaintiff. Of like import is *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479.

We therefore hold that so much of the bill as charges the defendants with contributory infringement of the plaintiff's letters patent and seeks relief on that ground presents a case arising under the patent laws of which the District Court should have taken jurisdiction.

But the other portions of the bill stand upon a different footing. The causes of action which they present—those not founded upon an unauthorized making, using or selling of devices embodying the inventions of the plaintiff's patents but resting only upon a breach of contractual obligations—do not arise under the patent laws. *New Marshall Co.* v. *Marshall Engine Co.*, 223 U. S. 473; *Henry* v. *Dick Co.*, 224 U. S. 1, 14, 15. As to them no Federal court can take jurisdiction of a suit against the West Virginia company without its consent, save in the district of its residence or that of the plaintiff, Jud. Code, § 51; and it hardly needs statement that the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction. Upon this point the rule otherwise prevailing respecting the joinder of causes of action in suits in equity must of course yield to the jurisdictional statute. Thus the West Virginia company's objection while not good as to the entire bill was good as to the causes of action not arising under the patent laws. Whether these causes of action can be retained as against the other defendants, after they are eliminated so far as the West Virginia company is concerned, is not open to consideration now. It

is not a question of Federal jurisdiction within the meaning of § 238 but only one of general equity jurisdiction and practice applicable as well to State as to Federal courts. *Bogart* v. *Southern Pacific Co.*, 228 U. S. 137, and cases cited.

The decree of dismissal is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Decree reversed.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY *v.* CARR.

ERROR TO THE SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT, STATE OF NEW YORK.

No. 257. Argued May 4, 1915.—Decided June 14, 1915.

During the same day railroad employés often and rapidly pass from intrastate to interstate employment and the courts are constantly called upon to decide close questions as to the dividing line between the two classes of employment. Each case must be decided in the light of its particular facts.

In this case, *held*, that:

A brakeman on an intrastate car in a train consisting of both intrastate and interstate cars who is engaged in cutting out the intrastate car so that the train may proceed on its interstate business, is while so doing engaged and employed in interstate commerce and may maintain an action under the Employers' Liability Act.

158 App. Div. 891, affirmed.

THE facts, which involve the validity of a verdict and judgment for damages under the Employers' Liability Act, are stated in the opinion.

Mr. Maurice C. Spratt and *Mr. Lester F. Gilbert* for plaintiff in error:

Recovery cannot be sustained under the Federal Employers' Liability Act, because neither the plaintiff nor the defendant was, at the time and place of the accident, engaged in interstate commerce. See *A., T. & S. F. Ry.* v. *Pitts*, 145 Pac. Rep. 1148; *Barlow* v. *Lehigh V. R. R.*, 214 N. Y. 116; *Connole* v. *Nor. & West. R. R.*, 216 Fed. Rep. 824; *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473; *Knowles* v. *N. Y. C. & H. R. R. R.*, 164 App. Div. 711; *LaCasse* v. *N. O., T. & M. R. R.*, 135 Louisiana, 129; *Lamphere* v. *Oregon R. & N. Co.*, 196 Fed. Rep. 336; *McAuliffe* v. *N. Y. C. & H. R. R. R.*, 164 App. Div. 846; *Minnesota Rate Cases*, 230 U. S. 352; *Mondou* v. *N. Y., N. H. & H. R. R.*, 223 U. S. 1; *Nor. Car. R. R.* v. *Zachary*, 232 U. S. 248; *Norton* v. *Erie R. R.*, 163 App. Div. 466; *Patry* v. *Chicago & W. I. Ry.*, 265 Illinois, 310, aff'g 185 Ill. App. 361; *Pedersen* v. *D., L. & W. R. R.*, 229 U. S. 146; *Reed* v. *Great West. R. R.* (1909), A. C. 31; *Shanks* v. *D., L. & W. R. R.*, 163 App. Div. 565; aff'd N. Y. Law Journal, April 7, 1915; *Seaboard Air Line* v. *Horton*, 233 U. S. 492; *Second Employers' Liability Cases*, 223 U. S. 1; *St. L., S. F. & T. Ry.* v. *Seale*, 229 U. S. 156; *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; *Southern Ry.* v. *United States*, 222 U. S. 20; *Safety Appliance Cases*, 222 U. S. 20; *Van Brimmer* v. *Tex. & Pac. Ry.*, 190 Fed. Rep. 394; *Wabash Ry.* v. *Hayes*, 234 U. S. 86.

Mr. Hamilton Ward, with whom *Mr. John Lewis Smith* was on the brief, for defendant in error.

Mr. Justice Lamar delivered the opinion of the court.

Carr was a brakeman on a "pick-up" freight train running from Rochester to Lockport over the lines of the New York Central. On November 18, 1910, some of the cars in this train contained interstate freight. Among those engaged in purely intrastate business were the two

cars, at the head of the train and next to the engine, which were to be left at North Tonawanda, New York. On arriving at that point they were uncoupled from the train, pulled by the engine down the track, and then backed into a siding. It was the duty of one brakeman (O'Brien), to uncouple the air hose from the engine, and for the other (Carr) to set the handbrakes in order to prevent the two cars from rolling down upon the main track. O'Brien, having failed to open the gauge to the stop-cock, suddenly and negligently "broke" the air hose. The result was that the sudden escape of air,—applied only in cases of emergency—violently turned the wheel handle attached to the brake which Carr at the time was attempting to set. The wrench threw Carr to the ground and for the injuries thus suffered he brought suit in a state court. If the case was to be governed by the law of New York he was not entitled to recover, since the injury was due to the negligence of O'Brien, a fellow-servant. He did recover a verdict under the Federal Employers' Liability Act and, the judgment thereon having been affirmed (157 App. Div. 941; 158 App. Div. 891), the case is here on writ of error to review that ruling.

The Railroad Company insists, that when the two cars were cut out of the train and backed into a siding, they lost their interstate character, so that Carr while working thereon was engaged in intrastate commerce and not entitled to recover under the Federal Employers' Liability Act. The scope of that statute is so broad that it covers a vast field about which there can be no discussion. But owing to the fact that, during the same day, railroad employés often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the State from interstate business. The present case is an instance of that kind—and many arguments have been advanced by the Railway Company

to support its contention that, as these two cars had been cut out of the interstate train and put upon a siding, it could not be said that one working thereon was employed in interstate commerce. But the matter is not to be decided by considering the physical position of the employé at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty; or if he is injured while preparing an engine for an interstate trip he is entitled to the benefits of the Federal Act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. *St. Louis &c. Ry.* v. *Seale*, 229 U. S. 156; *North Carolina R. R.* v. *Zachary*, 232 U. S. 248. This case is within the principle of those two decisions.

The plaintiff was a brakeman on an interstate train. As such, it was a part of his duty to assist in the switching, backing and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey. In performing this duty it was necessary to set the brake of the car still attached to the interstate engine, so that, when uncoupled, the latter might return to the interstate train and proceed with it, with Carr and the other interstate employés, on its interstate journey.

The case is entirely different from that of *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473, for there the train of empty cars was running between two points in the same State. The fact that they might soon thereafter be used in interstate business did not affect their intrastate status at the time of the injury; for, if the fact that a car had been recently engaged in interstate commerce, or was expected soon to be used in such commerce, brought them within the class of interstate vehicles the effect would be to give every car on the line that character. Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employé is

engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof. Under these principles the plaintiff is to be treated as having been employed in interstate commerce at the time of his injury and the judgment in his favor must be

Affirmed.

McDONALD AND UNITED STATES FIDELITY AND GUARANTY COMPANY *v.* PLESS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 283. Argued May 13, 1915.—Decided June 14, 1915.

The Conformity Act—Rev. Stat., § 914—does not apply to the power of the court to inquire into the conduct of jurors. The courts of each jurisdiction, state and Federal, must be in a position to adopt and enforce their own self-preserving rules.

While Rev. Stat., § 914, does not apply in this case, this court recognizes the same policy that has been declared by that court and by the courts in England and in most of the States of the Union, that the testimony of a juror may not be received to prove the misconduct of himself or his colleagues in reaching a verdict.

The rule, endorsed by this court in this case, that a juror may not impeach his own verdict is based upon controlling considerations of public policy which in such cases chooses the lesser of two evils.

While jurors should not reach a verdict by lot, or, as in this case, by averaging the amounts suggested by each, the verdict may not be set aside on the testimony of a juror as to his misconduct or that of his colleagues.

206 Fed. Rep. 263, affirmed.

THE facts, which involve the validity of a verdict and judgment of the Circuit Court of the United States in an action for services, are stated in the opinion.

Mr. Julius C. Martin, with whom *Mr. Thos. S. Rollins* and *Mr. Geo. H. Wright* were on the brief, for petitioners.

Mr. Joseph W. Bailey for respondents.

MR. JUSTICE LAMAR delivered the opinion of the court.

Pless & Winbourne, Attorneys at Law, brought suit in the Superior Court of McDowell County, North Carolina, against McDonald to recover $4,000 alleged to be due them for legal services. The case was removed to the then Circuit Court of the United States for the Western District of North Carolina. There was a trial in which the jury returned a verdict for $2,916 in favor of Pless & Winbourne. The defendant McDonald moved to set aside the verdict on the ground that when the jury retired the Foreman suggested that each juror should write down what he thought the plaintiffs were entitled to recover, that the aggregate of these amounts should be divided by 12 and that the quotient should be the verdict to be returned to the court. To this suggestion all assented.

The motion further averred that when the figures were read out it was found that one juror was in favor of giving plaintiffs nothing, eight named sums ranging from $500 to $4,000 and three put down $5,000. A part of the jury objected to using $5,000 as one of the factors inasmuch as the plaintiffs were only suing for $4,000. But the three insisted that they had as much right to name a sum above $4,000 as the others had to vote for an amount less than that set out in the declaration. The various amounts were then added up and divided by 12. But by reason of including the three items of $5,000 the quotient was so much larger than had been expected that much dissatisfaction with the result was expressed by some of the jury. Others however insisted on standing by the bargain and

the protesting jurors finally yielded to the argument that they were bound by the previous agreement, and the quotient verdict was rendered accordingly.

The defendant further alleged in his motion that the jurors refused to file an affidavit but stated that they were willing to testify to the facts alleged, provided the court thought it proper that they should do so. At the hearing of the motion one of the jurors was sworn as a witness, but the court refused to allow him to testify on the ground that a juror was incompetent to impeach his own verdict. That ruling was affirmed by the Court of Appeals. (206 Fed. Rep. 263.) The case was then brought here by writ of error.

On the argument here it was suggested that it was not necessary to consider the question involved as an original proposition, since the decision of the Federal court was in accordance with the rule in North Carolina (*Purcell* v. *Railroad Co.*, 119 N. Car. 739) and therefore binding under Rev. Stat., § 914, which requires that 'the practice, pleadings, and forms and modes of procedure in the Federal courts shall conform as near as may be to those existing in the State within which such Federal courts are held.' But neither in letter nor in spirit does the Conformity Act apply to the power of the court to inquire into the conduct of jurors who had been summoned to perform a duty in the administration of justice and who, for the time being, were officers of the court. The conduct of parties, witnesses and counsel in a case, as well as the conduct of the jurors and officers of the court may be of such a character as not only to defeat the rights of litigants but it may directly affect the administration of public justice. In the very nature of things the courts of each jurisdiction must each be in a position to adopt and enforce their own self-preserving rules. *Nudd* v. *Burrows*, 91 U. S. 427 (4), 441; *Railroad Co.* v. *Horst*, 93 U. S. 291, 300; *Grimes Co.* v. *Malcom*, 164 U. S. 483, 490; *Lincoln* v. *Power*, 151 U. S.

436, 442; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Liverpool &c. Co.* v. *Friedman*, 133 Fed. Rep. 716.

But though Rev. Stat., § 914, does not make the North Carolina decisions controlling in the Federal court held in that State, we recognize the same public policy which has been declared by that court by those in England and most of the American States. For while by statute in a few jurisdictions, and by decisions in others, the affidavit of a juror may be received to prove the misconduct of himself and his fellows, the weight of authority is that a juror cannot impeach his own verdict. The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.

These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended

to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

The rule on the subject has varied. Prior to 1785 a juror's testimony in such cases was sometimes received though always with great caution. In that year Lord Mansfield, in *Vaise* v. *Delaval*, 1 T. R. 11 refused to receive the affidavit of jurors to prove that their verdict had been made by lot. That ruling soon came to be almost universally followed in England and in this country. Subsequently, by statute in some States, and by decisions in a few others, the juror's affidavit as to an overt act of misconduct, which was capable of being controverted by other jurors, was made admissible. And, of course, the argument in favor of receiving such evidence is not only very strong but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule "would open the door to the most pernicious arts and tampering with jurors." "The practice would be replete with dangerous consequences." "It would lead to the grossest fraud and abuse" and "no verdict would be safe." *Cluggage* v. *Swan*, 4 Binn. 155; *Straker* v. *Graham*, 4 M. & W. 721.

There are only three instances in which the subject has been before this court. In *United States* v. *Reid*, 12 How. 361, 366, the question, though raised, was not decided because not necessary for the determination of the case. In *Clyde Mattox* v. *United States*, 146 U. S. 140, 148, such evidence was received to show that newspaper comments on a pending capital case had been read by the jurors. Both of those decisions recognize that it would not be safe to lay down any inflexible rule because there

might be instances in which such testimony of the juror could not be excluded without "violating the plainest principles of justice." This might occur in the gravest and most important cases; and without attempting to define the exceptions, or to determine how far such evidence might be received by the judge on his own motion, it is safe to say that there is nothing in the nature of the present case warranting a departure from what is unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict. The principle was recognized and applied in *Hyde* v. *United States*, 225 U. S. 347, which, notwithstanding an alleged difference in the facts, is applicable here.

The suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases, or in contempt proceedings brought to punish the wrongdoers is without foundation. For the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict.

Judgment affirmed.

NORFOLK SOUTHERN RAILROAD COMPANY *v.* FEREBEE.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 779. Argued April 23, 1915.—Decided June 14, 1915.

In the courts of North Carolina in an action under the Employers' Liability Act, there was a trial in which under the state practice the jury returned a special verdict finding that the Railroad Company was negligent and that plaintiff was not guilty of contributory negligence. The appellate court on account of errors in the charge re-

lating exclusively to the subject of damages granted a partial new trial limited to the amount of damages, and on which the court refused to admit evidence as to plaintiff's contributory negligence. *Held* that:

A substantive right or defense under the Federal law cannot be lessened or destroyed by a state rule of practice, and ordinarily damages and contributory negligence are so blended that only in rare instances can the question of amount of damages be submitted to the jury without also submitting the conduct of the plaintiff.

In this case, however, as defendant had not asked for a modification of the special verdict or to introduce newly discovered evidence, nor offered any such evidence on the second trial, the question of damages could be considered without also considering that of plaintiff's contributory negligence as that question had been entirely eliminated from the case, and the defendant was not deprived of any Federal right.

The practice of granting a partial new trial in actions under the Federal Employers' Liability Act is not to be commended.

167 N. Car. 290, affirmed.

THE facts, which involve the construction and application of the Federal Employers' Liability Act and the validity of a verdict and judgment in an action thereunder against the carrier, are stated in the opinion.

Mr. Murray Allen, with whom *Mr. W. B. Rodman*, *Mr. John H. Small* and *Mr. R. W. Sims* were on the brief, for plaintiff in error:

It was competent for defendant to show violation of its rules by plaintiff at the time of his injury.

The Supreme Court of North Carolina committed error in confining the trial to the single issue of damages. *American R. R.* v. *Didricksen*, 227 U. S. 145; *Grand Trunk Ry.* v. *Lindsay*, 230 U. S. 42; *Gulf &c. Ry.* v. *McGinnis*, 228 U. S. 173; *Jarrett* v. *Trunk Co.*, 144 N. Car. 302; *Kingston* v. *Railroad Co.*, 112 Michigan, 6; *Kennon* v. *Gilmer*, 131 U. S. 22; *McGovern* v. *P. & R. Co.*, 35 S. C. Rep. 127; *Michigan Cent. R. R.* v. *Vreeland*, 227 U. S. 59; *Nor.*

Car. R. R. v. *Zachary*, 232 U. S. 248; *Nor. & West. R. R.* v. *Ernest*, 229 U. S. 114; *Pierce* v. *Railroad Co.*, 173 U. S. 1; *Pederson* v. *Del., Lack. & West. R. R.*, 229 U. S. 146; *St. L., I. M. & S. Ry.* v. *Hesterly*, 228 U. S. 702; *St. L., I. M. & S. Ry.* v. *McWhirter*, 229 U. S. 265; *St. L., S. F. & T. Ry.* v. *Seale*, 229 U. S. 156; *Seaboard Air Line* v. *Horton*, 233 U. S. 492; *Simmons* v. *Fish*, 210 Massachusetts, 568; Sutherland on Damages (3d ed.), § 1248; *The Fri*, 140 Fed. Rep. 123, 124; *Vicksburg &c. R. R.* v. *Putnam*, 118 U. S. 545; *Watt* v. *Watt* (1905), A. C. 115.

Mr. Clyde A. Douglass and *Mr. William C. Douglass* for defendant in error.

Mr. Justice Lamar delivered the opinion of the court.

Ferebee was employed by the Norfolk Southern Railroad Company as a trainhand on a passenger train running from Raleigh, North Carolina, to Norfolk, Virginia. During the night, at some place on the journey the steps to the platform of one of the cars were torn away by coming in contact with some unknown obstruction. The consequence was that when Ferebee attempted to alight at a station, he stepped from the platform to the ground and received personal injuries for which he brought suit in the Superior Court of Wake County, North Carolina, under the Federal Employers' Liability Act (35 Stat. 65). The Company defended on the ground that the plaintiff had been guilty of contributory negligence in attempting to leave the car while it was in motion; in failing to hold on to the handrail; in failing to use his lantern and in failing to discover that the steps were missing. There was a trial in which, under the North Carolina practice, the jury returned a special verdict, finding, among other things, (1) that the Railroad Company was negligent, and (2) that the plaintiff was not guilty of contributory negligence.

The case was then taken to the Supreme Court of the State which, because of an error in the charge on the subject of damages, granted a partial new trial and remanded the case for a hearing in which the only question to be considered was the amount to be awarded the plaintiff. 163 Nor. Car. 351.

At the second trial the plaintiff, on cross-examination testified that when he left the car for the purpose of assisting passengers, he had in his hand a railroad lantern and by holding it beneath the platform and "making an examination like a car inspector" he could have seen that the steps had been torn away. He testified that he made no such examination and owing to the construction of the lantern—throwing light from the side instead of from the bottom—he did not see that they were missing. On motion of the plaintiff this evidence was excluded. Later the objection was withdrawn and the testimony admitted. On further cross-examination the plaintiff was asked if the rules did not require him to make such examinations. This evidence was excluded on the ground, among others, as stated in the argument here, that the rules themselves were the best evidence. The court refused to submit to the jury the question as to how much should be deducted from the damages sustained because of the plaintiff's contributory negligence, for the reason that the Supreme Court of North Carolina had granted a new trial to assess damages and had thereby excluded the issue of contributory negligence from the case.

The jury found for the plaintiff—the amount being somewhat larger than that named in the first verdict. The judgment thereon was affirmed. 167 Nor. Car. 290. The Company then brought the case here by writ of error, in which it contends that it was error for the Supreme Court to grant a partial new trial in which the question of damages only could be considered, inasmuch as the Employers' Liability Act entitles the defendant in all cases

to prove contributory negligence in mitigation of damages. On the other hand, the defendant in error contends that the question as to whether there should have been a partial new trial was a matter of procedure to be governed by the practice of the State of North Carolina.

But a substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of practice. Damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages, that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the injury.

But this record, in connection with the special-finding first verdict, shows that in this case the two matters were in fact separable, so that the splitting up the issues and granting a partial new trial did not in this particular instance operate to deprive the defendant of a Federal right. For it appears that Ferebee had nothing to do with the loss of the steps and was not guilty of contributory negligence in failing to see that they were missing. His conduct at the time of his fall could not, therefore, affect the amount of the verdict so that it was possible, on the second trial, to award damages without considering the conduct of the plaintiff or retrying the question of contributory negligence.

The new trial was granted at the instance of the Railway Company. It did not ask the Supreme Court for a rehearing, or for a modification of the mandate, or for permission to introduce newly discovered evidence, nor was there any offer of such newly discovered evidence on the second trial. That offered and excluded was not in the nature of newly discovered evidence and the ruling of the trial court in reference to such evidence was in

accordance with the mandate of the Supreme Court. The other matters relied on here for a reversal involve no construction of the Federal Act and are not of a nature to warrant this court in granting a new trial. *Seaboard Air Line* v. *Duvall*, 225 U. S. 486.

Under the facts, therefore, it cannot be said that the decision operated to deprive the Railway Company of a Federal right. But we recognize that the practice is not to be commended. Before granting partial new trials, in any case under the Federal Employers' Liability Act, it should, as said by the Supreme Court of North Carolina, "clearly appear that the matter involved is entirely distinct and separable from other matters involved in the issue . . . and that no possible injustice can be done to either party. In cases of this character we do not know that the practice is generally to be commended." The North Carolina court further said in that case:—"An examination of all the evidence relating to the injury and its cause and the conduct of the plaintiff, as well as of defendant's agents, might show that it is so interwoven with that relating to damage that to fairly ascertain what is a just compensation the plaintiff should receive, if he is entitled to recover at all, can best be determined by trying the whole case before one judge and one jury instead of 'splitting it up' between different judges and different juries." *Jarrett* v. *Trunk*, 144 N. Car. 299, 302. See also *Simmons* v. *Fish*, 210 Massachusetts, 568. *Kennon* v. *Gilmer*, 131 U. S. 22, 28, deals with the Federal practice in somewhat similar cases.

Judgment affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* MULBERRY HILL COAL COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 118. Argued January 14, 1915.—Decided June 14, 1915.

A state statute which merely requires a railroad company to furnish cars within a reasonable time after demand made for them, is not such a direct burden upon interstate commerce, as to be void in the absence of legislation on the subject by Congress; and so *held* as to ch. 114, § 84, Rev. Stat. Illinois, 1913.

Whether such a statute, valid when enacted, became an unconstitutional burden on interstate commerce on the enactment of the amendment of the Interstate Commerce Act, not now decided as that point was not raised in either of the state courts.

The state courts have jurisdiction of a case for damages against a carrier for failure to deliver cars in accordance with its own rules for distribution, where the rule itself is not attacked but discrimination against plaintiff notwithstanding the rule is the basis of the suit. *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121.

While the amendment of 1906 to the Interstate Commerce Act gave new rights to shippers, it preserved existing rights and did not supersede the jurisdiction of the state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of administrative power and discretion of the Commission or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive. *Id.*

257 Illinois, 80, affirmed.

THE facts, which involve the liability of a carrier for failure to furnish cars to a coal mining corporation located on its line, are stated in the opinion.

Mr. Blewett Lee, with whom *Mr. Edward C. Kramer*, *Mr. John G. Drennan* and *Mr. Walter S. Horton* were on the brief, for plaintiff in error:

The case should have been dismissed for want of jurisdiction. Congress has preëmpted the field. The reason-

ableness of carriers' practices is for the Commission, especially in cases of discrimination, or of inadequacy of carriers' total car supply. There is conflict between state and Federal rules as to duty of supplying cars.

The Illinois statute as applied to interstate commerce is unconstitutional. The subject has been withdrawn from state authority.

In support of these contentions, see *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362; *Chapman* v. *Goodnow's Admr.*, 123 U. S. 540; *Chicago, R. I. & P. Ry.* v. *Hardwick Elevator*, 226 U. S. 426; *Hillsdale Coal Co.* v. *Penna. R. R.*, 23 I. C. C. 186; *Ill. Cent. R. R.* v. *Mulberry Hill Coal Co.*, 161 Ill. App. 272; *S. C.*, 257 Illinois, 80; *Ill. Cent. R. R.* v. *River Coal Co.*, 150 Kentucky, 489; *In re Irregularities in Mine Ratings*, 25 I. C. C. 286; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Jacoby* v. *Penna. R. R.*, 200 Fed. Rep. 989; *Logan Coal Co.* v. *Penna. R. R.*, 154 Fed. Rep. 497; *Louis. & Nash. R. R.* v. *Cook Brewing Co.*, 223 U. S. 70; *Mitchell Coal Co.* v. *Penna. R. R.*, 230 U. S. 247; *Montana W. & L. Co.* v. *Morley*, 198 Fed. Rep. 998; *Morrisdale Coal Co.* v. *Penna. R. R.*, 230 U. S. 304; *Penna. R. R.* v. *International Coal Co.*, 230 U. S. 184; *St. L., I. M. & S. Ry.* v. *Edwards*, 227 U. S. 265; *St. L., S. W. Ry.* v. *Arkansas*, 217 U. S. 136; *Southern Ry.* v. *Reid*, 222 U. S. 424; *Southern Ry.* v. *Reid & Beam*, 222 U. S. 444; *Tex. & Pac. Ry.* v. *Abilene Cotton Co.*, 204 U. S. 426; *Traer* v. *Chi. & Alton R. R.*, 13 I. C. C. 451; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87; *Yazoo & Miss. Valley R. R.* v. *Greenwood Grocery Co.*, 227 U. S. 1.

Mr. Frederick B. Merrills for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

This was an action brought by defendant in error against plaintiff in error to recover damages for the alleged failure

of the latter to furnish coal cars at plaintiff's mine, located upon the line of defendant's railroad, pursuant to plaintiff's requirements and demands. It was founded upon § 23 of an act of March 31, 1874, in relation to fencing and operating railroads, as amended (Hurd's Rev. Stat. Illinois, 1913, c. 114, § 84, p. 1955). The declaration set forth that plaintiff was the owner of and engaged in operating a coal mine equipped with appliances necessary for the mining of coal, and was possessed of a large amount of coal at the mine; that defendant was the owner of the railroad upon which the mine was located, there being a switch at the mine, etc., and that on certain specified days in the year 1907 plaintiff notified defendant that it was ready and proposed to load certain specified quantities of coal, and needed defendant's cars in which to load it, and that defendant failed to furnish the cars, and by reason thereof plaintiff sustained damages. The plea was the general issue. There was a trial by jury, at which evidence was given tending to prove the averments of the declaration. Defendant's evidence showed that it was engaged in interstate commerce, having lines of railway extending to other States besides Illinois, with coal mines located upon its lines in three States, the greater part of them being in Illinois; that during the time covered by the action plaintiff shipped 95% of its coal into States other than Illinois, and that if the cars demanded by it had been furnished 95% of the coal shipped in them would have gone to points in other States and off the lines of defendant; and that the coal mines located along defendant's line were divided into divisions, and its equipment for hauling coal was first divided among the divisions and afterwards distributed among the coal operators. There was also evidence of a general shortage of coal cars upon the Illinois Central lines during the year 1907; but the reason for this was not clearly shown, and it did not appear that it was attributable to any sudden emergency or to other causes

beyond the control of the carrier. Defendant introduced in evidence its established rules governing the distribution of coal cars during the period covered by the suit, and there was evidence tending to show that these were followed. But it cannot be said that this was conclusive, and it was distinctly negatived by the finding of the jury.

A verdict was rendered in favor of plaintiff, which by remittitur was reduced to $716.92. The resulting judgment was affirmed by the Supreme Court of Illinois (257 Illinois, 80), and the case comes here upon questions raised under the Commerce Clause of the Constitution of the United States and the Act to Regulate Commerce.

1. The fundamental Federal question, and the only one with which the state Supreme Court dealt, is whether the Illinois statute is a direct burden upon interstate commerce and therefore repugnant to the Commerce Clause, irrespective of Congressional action. This was raised by a motion to dismiss and a motion for the direction of a verdict in favor of defendant. The statute, so far as now pertinent, is as follows:

"Every railroad corporation in the State shall furnish, start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging way-passengers and freights; and shall take, receive, transport and discharge such passengers and property, at, from and to such stations, junctions and places, on and from all trains advertised to stop at the same for passengers and freight, respectively, upon the due payment, or tender of payment of tolls, freight, or fare legally authorized therefor, if payment shall be demanded, etc."

The Illinois Supreme Court construed it as follows: "The only requirement of the statute, as applied in this

case or any other case, is, that the railroad corporation shall furnish cars, within a reasonable time after they are required, to transport the property offered for transportation, and what would be a reasonable time in any case would depend upon all the circumstances and conditions existing, including the requirements of the interstate commerce carried on by the corporation."

In that court, *Houston & Tex. Cent. Railroad* v. *Mayes*, 201 U. S. 321, 329, and *St. Louis S. W. Ry. v. Arkansas*, 217 U. S. 136, 149, were cited. In the first of these, the state law absolutely required that a railroad should furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, making no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States or in other places within the same State, or any allowance for interference with traffic occasioned by wrecks or other accidents upon the same or other roads; and for any dereliction of the carrier, owing perhaps to circumstances beyond its control, it was made answerable not only to the extent of the damages incurred by the shipper, but in addition to an arbitrary penalty of $25 per car for each day of detention. In the *Arkansas Case*, the rule of the state railroad commission, as applied by the state court, penalized the carrier for delivering its cars to other roads for the movement of interstate commerce pursuant to the regulations of the American Railway Association, because, as the state court concluded, these regulations, although governing ninety per centum of the railroads in the United States, were inefficient and should be disregarded. This court held (p. 149) that the rule of the state court "involved necessarily the assertion of power in the State to absolutely forbid the efficacious carrying on of interstate commerce, or, what is equivalent thereto, to cause the right to efficiently conduct such

commerce to depend upon the willingness of the company to be subjected to enormous pecuniary penalties as a condition to the exercise of the right."

The statute now in question merely requires a railroad company to furnish cars within a reasonable time after demand made for them, and the question, What is a reasonable time? is to be determined in view of the requirements of interstate commerce. That the operation of the statute is thus limited in practice and not merely in theory is shown by the history of the case at bar. Upon a former trial there was a verdict for the plaintiff, and the resulting judgment came under the review of the appellate court (161 Ill. App. 272), which, while ruling in favor of the plaintiff upon the main questions, reversed the judgment and awarded a new trial (p. 282) because of the rejection of evidence offered by the defendant to show that there were times when it had not a sufficient amount of coal cars to supply the demand of all the operators along its lines, that this was the case during the year 1907, and that during this year plaintiff received its fair and just proportion of the cars.

We agree with the conclusion reached by the state court that the Illinois statute is not a direct burden upon interstate commerce, so as to be void in the absence of legislation by Congress.

2. It is here insisted that by reason of the provisions of the Federal Act to Regulate Commerce and amendments (c. 104, 24 Stat. 379; c. 3591, 34 Stat. 584; etc.) the state law, however valid when originally enacted, has become an unconstitutional regulation when applied, as in the present case, to interstate transactions. Reference is made to § 1 of the Act, as amended in 1906 (c. 3591, 34 Stat. 584), which provides: "And the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage . . . ; and it shall be the duty of every carrier subject to the

provisions of this Act to provide and furnish such transportation upon reasonable request therefor." *Chi., R. I. &c. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426, 435; *St. Louis, Iron Mtn. & S. Ry.* v. *Edwards*, 227 U. S. 265; *Yazoo & Miss. R. R.* v. *Greenwood Gro. Co.*, 227 U. S. 1, and other cases of that class, are cited, to which may be added *Charleston & West. Car. Ry. Co.* v. *Varnville Furniture Co.*, decided June 1, 1915, 237 U. S. 597.

As to this point, it is sufficient to say that no such question was raised in either of the state courts. Indeed, after the denial of the motion to dismiss and the motion to direct a verdict, defendant requested, and the trial court gave to the jury, an instruction setting forth almost *in haec verba* the requirements of the state statute, and declaring "that no other or greater duty devolves upon railroad companies to receive and transport freight than mentioned in the statute."

3. The trial court overruled a motion, made by defendant at the close of the evidence, to dismiss the suit for want of jurisdiction: (a) because the cars demanded were to be used in interstate traffic; and (b) because the action involved defendant's duty to deliver cars during a period of time when there was a car shortage, and when plaintiff, and also the other coal operators, were shipping the greater portion of their coal in interstate commerce, and therefore the suit involved a question of the proper method of car distribution for interstate commerce at a time of shortage, authority over which question was vested in the Interstate Commerce Commission, and until that Commission had acted the court was without jurisdiction. The denial of this motion is insisted upon as error; but, under the facts of the case, the ruling is clearly sustained by our recent decision in *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121. In that case, as in this, an interstate carrier was sued in a state court for damages caused by its failure to furnish a shipper with cars in which to load coal for shipment to

points within and without the State; the pleadings alleged that the carrier failed to perform its duty to furnish cars, and also that in violation of a state statute it unjustly discriminated against the shipper by failing to distribute cars in accordance with the carrier's own rule applicable in time of shortage. A judgment having been rendered for damages caused by the unjust discrimination in the distribution of cars, the carrier brought the case here, insisting (1) that the determination of the proper basis for the distribution of cars was a matter calling for the exercise of the administrative power of the Interstate Commerce Commission; (2) that no court had jurisdiction of an action for discriminatory allotment until after the commission had determined that the established rule for distribution was improper; and (3) that no suit could be brought against an interstate carrier for damages occasioned by a failure to deliver cars or for an unjust discrimination in distribution except in a court of the United States. Upon a review of §§ 8 and 9 of the Act to Regulate Commerce and of the proviso in § 22 which declares that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," we held (p. 130) that while the Act gave shippers new rights, it at the same time preserved existing causes of action; that it did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive; that in actions against railroad companies for unjust discrimination in interstate commerce where the rule of distribution itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the authority of the Interstate Commerce Com-

mission; but if the action is based upon a violation or discriminatory enforcement of the carrier's own rule for car distribution no administrative question is involved, and such an action, although brought against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or the Federal courts. And because in that case the action was not based upon the ground that the carrier's rule of car distribution was unreasonable or discriminatory, but that plaintiff was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled even upon the basis of the carrier's own rule of distribution, it was held that the state court had jurisdiction without previous application to the Interstate Commerce Commission.

It is true that the *Puritan Case* arose before the passage of the Hepburn Act of 1906; but there is nothing in the amendments introduced by that Act to affect the jurisdiction of the state court in an action such as the present.

In this case, plaintiff made no attack whatever upon defendant's rules for car distribution. The declaration, indeed, is based wholly upon the statute, and contains no averment of discrimination. It was defendant that endeavored to import the question of car distribution into the case, by introducing the evidence above referred to, and by requesting an instruction (which the court accordingly gave) to the effect that if defendant had not and could not procure sufficient coal cars to furnish all of the operators on its lines with all the cars desired and demanded by them, and did fairly and equitably distribute its available cars among the operators, it discharged its whole duty to plaintiff. But the verdict of the jury in favor of plaintiff negatived the hypothesis of fact upon which this and another like instruction were based.

Judgment affirmed.

WOODWARD *v.* DE GRAFFENRIED.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 164. Submitted February 25, 1915.—Decided June 14, 1915.

In an action to determine by what law the beneficiaries of a Creek allotment are to be determined where the allotment was selected by a Creek citizen and made by the Dawes Commission under § 11 of the Curtis Act of June 28, 1898, followed first by the death of the allottee after receiving the allotment and prior to the Original Creek Agreement and then by action of the Commission, after ratification of that agreement, awarding the land to the heirs of the deceased allottee, and the ultimate issue of a patent to them, *held* after reviewing the history of the legislation of Congress in regard to distribution of Creek lands, that:

The only lawful authority possessed by the Dawes Commission to allot Creek lands prior to the adoption of the Original Creek Agreement was derived from the Curtis Act.

Under § 11 of the Curtis Act, allottees took no assignable or inheritable interest in the land or anything more than an exclusive right to possess and enjoy the surface of the land during the lifetime of the occupant.

Decisions of the state court regarding descent of property, the earliest of which was made within three years and after the present action was commenced, cannot be regarded as a rule of property; but, while giving those decisions full weight, this court must examine the questions involved upon their merits.

The rule that reports of the committee having the matter specially in charge, so far as they antedate the statute, may be resorted to as aid to interpretation, applies especially in construing the Curtis Act, to the reports of the Dawes Commission as that Commission was in a real sense "the eyes and the ears" of Congress pertaining to Indian Territory and the legislation was framed with special regard to its recommendations.

Under the Original Creek Agreement, allotments made prior thereto under the Curtis Act, if not inconsistent therewith, were to be treated as if made after the ratification thereof including designation of beneficiaries in case of the death of the allottee.

Under the Original Creek Agreement the allotments of those who had selected lots and received allotments under the Curtis Act

and had died before the ratification of the agreement descended according to the Creek Laws and not according to the laws of Arkansas.

The equitable title to an allotment made under the Curtis Act to a Creek female citizen who died before the ratification of the Original Creek Agreement vested in her heirs under § 28 of the Agreement; and, if not within excepted classes, was confirmed by § 6 of the agreement to her heirs to be determined by the Creek laws of descent.

Under the laws of the Creek Indians the husband whether citizen or not took a half interest in his wife's property if she died without children.

The restrictions upon alienation contained in the Original Creek Agreement did not apply to allotments made on behalf of deceased members of the tribe. *Skelton* v. *Dill*, 233 U. S. 206.

A partition suit which is dismissed because the plaintiff could not maintain it against defendants who held adversely, without first establishing title in an action in equity is not *res judicata* that the plaintiff has no interest in the property and a bar to an action in ejectment by plaintiff against the same defendants.

36 Oklahoma, 81, affirmed.

THE facts, which involve the construction and application of the Curtis Act and the Original Creek Agreement and the disposition of an allotment made by the Dawes Commission to the heirs of a Creek Indian after the death of the allottee, are stated in the opinion.

Mr. William R. Lawrence, Mr. F. W. Clements and *Mr. Geo. S. Ramsey* for plaintiffs in error.

Mr. Joseph C. Stone, Mr. Thomas H. Owen and *Mr. Charles A. Cook* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an ejectment suit, brought by defendant in error in the District Court of Muskogee County, Oklahoma, to recover an undivided half interest in a tract of 160 acres of land situate in that county, formerly part of the domain of the Creek Nation in the Indian Territory. The tract was allotted to Agnes Hawes, a Creek Freed-

woman, who, after receiving the allotment, died without issue, leaving surviving her husband, Ratus Hawes (under whom defendant in error claims), her mother, Peggie Woodward, one of the plaintiffs in error, and her father, Louis Woodward, since deceased, to whose rights the remaining plaintiffs in error have succeeded. From an agreed statement of facts it appears that Agnes Hawes was a recognized citizen of the Creek Nation, she being a negress of full blood and enrolled on the Freedmen Roll of that Nation; that she died June 29, 1900, having previously made selection of the tract in question as her allotment of land in that Nation before the Commission to the Five Civilized Tribes and received from the Commission a certificate of allotment therefor; that after her death, and after the adoption of the Original Creek Agreement (Act of March 1, 1901, c. 676, 31 Stat. 861; effective May 25, 1901, 32 Stat. 1971), the Commission awarded the same land to her heirs, and thereafter, on April 1, 1904, a patent for it was duly issued to the "Heirs of Agnes Hawes," without naming them, which patent was in due form and approved by the Secretary of the Interior; that the patent, having been properly recorded, was accepted by her heirs; that at her death Agnes was the legal and acknowledged wife of Ratus Hawes, a non-citizen; that she left no children or grandchildren surviving her, had no children by her said husband, and was survived by him and by her parents already mentioned; and that on June 22, 1904, Ratus Hawes conveyed to plaintiff (defendant in error) an undivided half interest in the lands in question, by deed duly acknowledged and recorded in the records at Muskogee.

There was a judgment for the plaintiff, which was affirmed by the Supreme Court of Oklahoma (36 Oklahoma, 81), and the present writ of error was allowed.

A brief additional recital should preface a statement of the questions in controversy. The date of the selection

by Agnes Hawes and of the allotment to her of the tract in question is not mentioned in the record; but it must have been on or after April 1, 1899, that being the date on which the allotment office for the Creek Nation was opened at Muskogee by the Commission to the Five Civilized Tribes, as appears from their Sixth Annual Report, p. 18, referred to in the marginal note, *infra*. Therefore, both the allotment and the death of the allottee occurred within the period during which § 11 of the Curtis Act (Act of June 28, 1898, c. 517, 30 Stat. 495, 497), was in force in the Creek Nation, by the terms of which the Commission was directed, upon the completion of the citizenship roll and the survey of the lands of the tribe, to "proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same," with reservations that need not at the moment be specified.

From the facts stated it is also evident that the allotment to Agnes Hawes was made under and by virtue of this section, and therefore comes within the category of allotments confirmed by the Original Creek Agreement (Act of March 1, 1901, c. 676, § 6, 31 Stat. 861, 863).

For we lay on one side, as quite untenable, the contention of defendant in error that the allotment was made not under the Curtis Act but under the Creek Agreement of February 1, 1899, which failed to become law. The principal ground of the contention is that conditions precedent to allotment, prescribed in terms or necessarily implied from § 11 of the Curtis Act, had not been performed in the Creek Nation: the rolls of citizenship not having been completed, no appraisement or classification of the lands having been made for determining what lands were susceptible of allotment and for equalizing the value of allot-

ments, no selections having been approved by the Secretary of the Interior, etc. Not to mention other answers that might be made to this, it is sufficient for the present to say that the only lawful authority to allot Creek lands possessed by the Commission prior to the adoption of the Original Creek Agreement, was derived from the Curtis Act, and that all allotments made during the intervening period were made under instructions issued by the Secretary of the Interior with express reference to the latter act. This will be more particularly shown when we come to discuss, as we must, the proper construction of the two Acts referred to, and their effect upon the title to the allotted tract. The fact that conditions precedent imposed by the Curtis Act had not been performed when the Commission proceeded to make Creek allotments after its passage and prior to the Original Creek Agreement may have furnished one of the reasons for the express ratification of such allotments contained in § 6 of the Agreement; but this, of course, is far from saying that the allotments were not made under the Curtis Act.

The case presented, therefore, is that of a Creek allotment selected by the citizen and made by the Dawes Commission under § 11 of that Act, followed first by the death of the allottee after receiving the allotment and prior to the Original Creek Agreement, and then by action of the Commission, after ratification of that Agreement, awarding the lands to the "heirs" of the deceased allottee, and the ultimate issue of a patent to them.

The principal question is: By what law are the beneficiaries of the allotment and patent to be determined? Plaintiffs in error contend that, by the terms of § 11 of the Curtis Act, Agnes Hawes took an estate of inheritance, subject to the reservation of the minerals; that at her death this interest descended to her heirs, according to the Arkansas laws of descent, under which the husband was not an heir, and acquired no interest in the land by the

curtesy, there being no child born of the marriage; and that § 6 of the Original Creek Agreement in ratifying the allotment vested an absolute title in her heirs, which related back to the date of the allotment or else to the date of her death, and carried the minerals with it. It is the contention of defendant in error, sustained by the Oklahoma courts, that the allotment to Agnes Hawes under the Curtis Act did not vest in her the fee or any heritable interest; that the (equitable) fee was first vested in her "heirs" by the provisions of the Original Creek Agreement, they taking by purchase and not by descent; and that who should take as her "heirs" must be determined according to the Creek laws of descent, under which the surviving husband took an undivided half interest, which passed by his deed to defendant in error.

It is not open to question that at the death of Agnes Hawes (June 29, 1900) the Arkansas law of descent was in force in the Creek Nation. This court, in a recent decision, pointed out the successive acts of legislation, culminating in §§ 26 and 28 of the Curtis Act itself, by which Congress had displaced the tribal laws of descent and distribution and substituted the Arkansas law as expressed in Chapter 49 of Mansfield's Digest. *Washington* v. *Miller*, 235 U. S. 422, 424. But, as shown in that case (p. 425), the Original Creek Agreement contained provisions which reinstated the Creek laws of descent and distribution for certain purposes affecting the allotments in that Nation. Whether they apply to the present case is a subordinate question, to be discussed in its order.

In order to determine the questions thus presented it is necessary first to ascertain the true meaning of § 11 of the Curtis Act, and then to consider the pertinent provisions of the Original Creek Agreement.

In *Barnett* v. *Way* (1911), 29 Oklahoma, 780, a case precisely in point with the present—the allotment having been made under § 11 of the Curtis Act and the allottee

having died thereafter and before the ratification of the Original Creek Agreement—the Supreme Court of Oklahoma held the rule of descent and distribution obtaining at the death of the allottee to be immaterial because she had no title in fee, legal or equitable, that could descend; and further held that by § 6 of the Original Agreement her allotment was ratified, and by § 28 was vested in her heirs, to be ascertained as of the date of her death according to the rule of descent and distribution then in force in the Creek Nation governing the devolution of property owned by any of its deceased members at the time of the member's death. To the same effect is *Divine* v. *Harmon*, 30 Oklahoma, 820. These decisions are invoked by defendant in error as establishing a rule of property. But, as the first of them was rendered only a little more than three years ago, after the present action was commenced and less than a year before it was decided by the Supreme Court of Oklahoma, it seems proper that, while giving due weight to the state decisions, we should reëxamine the questions upon their merits.

Upon a first attentive reading of the Curtis Act (c. 517, 30 Stat. 495) it is seen to be divisible into three principal parts: (a) the first 28 sections, which contain obligatory provisions applicable (with minor exceptions not important in this discussion) generally throughout the Indian Territory, which at that time (Act of May 2, 1890, c. 182, § 29, 26 Stat. 81, 93) included the country of the Five Civilized Tribes, and little besides; (b) § 29, which ratified an agreement made by the Dawes Commission with commissions representing the Choctaw and Chickasaw tribes on April 23, 1897 (the "Atoka Agreement"), as amended, the same to be of full force and effect if ratified before December 1, 1898, by a majority of the votes cast by the members of the tribes at an election held for that purpose; "and if said agreement as amended be so ratified, the provisions of this Act shall

then only apply to said tribes where the same do not conflict with the provisions of said agreement," and (c) § 30, ratifying and resubmitting, on similar terms and with like effect, an agreement made by the Dawes Commission with a commission representing the Creek tribe on September 27, 1897, as amended.

The first part of the Act required (§ 11) the allotment, *without the consent of the tribe*, of "the exclusive use and occupancy of the surface" of all tribal lands susceptible of allotment, reserving to the tribe all oil, coal, asphalt, and mineral deposits, and all town sites; the oil and other minerals to be leased (§ 13) by the Secretary of the Interior; the town lots to be sold (§ 15), with right of preemption to the owner of the substantial improvements, if any, and the purchase money to become the property of the tribe *upon the execution and delivery to the purchaser, by some person authorized by the tribe, of a deed* conveying to him the title to the lands. Each of the proposed agreements contains provisions for the allotment of lands to the members of the tribes, to be followed by the delivery of a *patent conveying all the right, title and interest of the tribe*, excepting, in the case of the Atoka Agreement, the coal and asphalt under the land. With respect to allotments to be made under § 11, *no provision is made for extinguishing the tribal title.* But there is a proviso (p. 498): "That the lands allotted shall be nontransferable until after full title is acquired, and shall be liable for no obligations contracted prior thereto by the allottee, and shall be nontaxable while so held." By § 12, the allotments were to be reported to the Secretary of the Interior, "and *when he shall confirm such allotments* the allottees shall remain in peaceable and undisturbed possession thereof, subject to the provisions of this Act."

Considering the language of § 11, and the absence of provision for extinguishing the tribal title to allotted lands, in contrast with the provisions respecting title

contained in § 15 as to town lots, and those contained in each of the proposed agreements as to both allotments and town lots, it seems sufficiently plain, upon the face of the Act, that allottees under § 11 were to take only "the exclusive use and occupancy of the surface," with the right to remain in peaceable and undisturbed possession, but without right to transfer the allotment until full title should be acquired. For the acquisition of such title, no provision was made by this Act, except as either or both of the proposed Agreements might be ratified by the tribes concerned. There was, however, in § 15 of an Act of March 3, 1893, c. 209, 27 Stat. 612, 645, a grant of authority to each of the tribes to allot their lands in severalty, not exceeding 160 acres to any one person.

Having regard, therefore, merely to the language employed in § 11 of the Curtis Act and the context, there is no foundation for the contention that allottees thereunder took any assignable or inheritable interest in the land, or anything more than an exclusive right to possess and enjoy the surface of the land during the lifetime of the occupant.

It is, however, insisted by plaintiffs in error that when the conditions existing at the time of the passage of this Act, and the objects Congress sought to attain by it, are fully understood and considered, § 11 bears a different import, and by its true construction confers upon the allottee at least an equitable title of inheritance in the lands set apart to him, saving the minerals. It is said that to confer upon the allottee a mere right of occupancy for life, to revert to the tribe and become a part of the public domain upon his decease, would have given to the Creek Indians less than they already had under their own laws, which conferred the right to inclose and cultivate lands of the tribe and to pass the improvements to their heirs at their death. It is insisted that at least the Curtis Act allottee took an inheritable right of occupancy,

and that this, coupled with the confirmation arising from § 6 of the Original Agreement, vested the fee in the heirs of the allottee as of the time of his or her decease, even though that event occurred before the ratification of the Agreement.

It is very true that this Act, passed as it was during a period of transition in the history of the Indian Territory, must be interpreted in the light of the situation then existing, and that we should have especial regard to the "old law" and the "mischief" in order to correctly appreciate the "remedy." And, in view of the great importance of the question before us—for it appears that much the greater part of the Creek lands were allotted during the period intervening between April 1, 1899, and May 25, 1901,—we have resorted to all authentic sources of information within reach in order to realize and appreciate the situation that presented itself to Congress when the Curtis Act was passed. The result is that the view above expressed respecting the true intent and meaning of § 11 is most fully confirmed.

The history of the removal of the Muskogee or Creek Nation from their original homes to lands purchased and set apart for them by the Government of the United States in the territory west of the Mississippi River, does not differ greatly from that of the others of the Five Civilized Tribes rehearsed in recent decisions of this court. *Mullen* v. *United States*, 224 U. S. 448; *Goat* v. *United States*, 224 U. S. 458, 461. Pursuant to treaty provisions (Treaty of 1826, Art. 6, 7 Stat. 286; Treaty of 1832, Arts. 12 and 14, 7 Stat. 366; Treaty of 1833, Art. 3, 7 Stat. 417), the Creeks held their lands under letters patent issued by the President of the United States dated August 11, 1852, vesting title in them as a tribe, to continue so long as they should exist as a nation and continue to occupy the country thereby assigned to them. McKellop's Comp. 1893, p. 9. These treaties and the

Treaty of 1856, 11 Stat. 699, Articles 4 and 15, conferred in ample terms the right of self-government so far as compatible with the Constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with the Indian tribes. The other four tribes held similar patents.

In the course of time, changing conditions and the great influx of white people into the Territory pointed to the necessity of abolishing, if possible, the tribal organizations, and allotting the land in severalty. But because of the special rights that had been conferred upon these tribes, and the fact that they held patents for their respective lands, it was considered proper, if not indispensable, to obtain the consent of the Indians to the overthrow of the communal system of land ownership. As early as the year 1866, shortly after the close of the Civil War, when new treaties were negotiated with the Five Civilized Tribes (14 Stat. 755, 769, 785, 799), the treaty with the Choctaws and Chickasaws (pp. 774–778) contained provisions for a survey, division, and allotment of their lands, so as to change the tenure from a holding in common to a holding in severalty, in tracts of a quarter-section each; but this plan was made contingent upon the consent of the Choctaw and Chickasaw people through their respective legislative councils. The Chickasaw Council, by an act approved November 9, 1866 (reënacted October 17, 1876), not only confirmed the treaty but gave assent to the adoption of the proposed plan of allotment. The Choctaw Council, by an act approved December 21, 1866, referred the proposition "to the people at large to be declared through their legal representatives in council at the October session, A. D. 1867;" but no affirmative action appears to have been taken upon it. And so the provisions of the treaty in this respect were not put into effect.

When Congress in the act of February 8, 1887, ch. 119,

24 Stat. 388, entered upon the general policy of allotting lands in severalty to the Indians upon the various reservations, the lands of the Creeks and other Indians in the Indian Territory were by § 8 excluded from the operation of the Act.

By § 15 of the Indian Appropriation Act of March 3, 1893, c. 209, 27 Stat. 612, 645, Congress sought to encourage the Five Civilized Tribes to themselves enter upon the policy of allotting their lands in severalty, by giving the express consent of the United States to such allotments, not exceeding 160 acres to any one individual, declaring that the allottees should be deemed to be citizens of the United States and that the reversionary interest of the United States in the allotted lands should cease, and appropriating money to pay for the survey of any lands so allotted. As a declaration of the policy of the United States this section has importance. But it seems to have had no direct effect in the way of establishing that policy; at least, we have found nothing to show that any of the tribes allotted any of their land pursuant to it.

By § 16 of the same Act provision was made for the appointment of a commission to enter into negotiations with the same tribes for the purpose of extinguishing the tribal titles, either by cession to the United States or by allotment and division in severalty among the Indians, or by such other method as might be agreed upon between the several tribes and the United States, with a view to the ultimate creation of a State or States of the Union to embrace the lands within the Territory. This was the origin of the Commission to the Five Civilized Tribes, familiarly known as the Dawes Commission. Its reports, issued annually thereafter, and communicated by the Secretary of the Interior to Congress for its information and guidance, gave a complete and interesting history of the efforts made to further the policy of Congress—efforts

beginning in discouragement but finally crowned with success. So far as these reports antedate the legislation that is under inquiry, they may of course be resorted to as aids to interpretation, for the Commission was in a very real sense "the eyes and the ears" of Congress in matters pertaining to affairs in the Indian Territory, and legislation was framed with a special regard to its recommendations. (See *Holy Trinity Church* v. *United States*, 143 U. S. 457, 465; *Binns* v. *United States*, 194 U. S. 486, 495.) We append, in the margin a reference-list of these reports.[1]

The 1st Report contains a general explanation of conditions in the Territory, indicating (p. lxviii) the complete

[1] REFERENCE LIST OF ANNUAL REPORTS OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES, transmitted to Congress in connection with the reports of the Secretary of the Interior, and printed as House Documents.

1st Report, Nov. 20, 1894, House Ex. Doc., Part 5, 53d Cong., 3d Sess., Vol. 14, pp. lix–lxx.

2d Report, Nov. 14, 1895, House Doc. No. 5, 54th Cong., 1st Sess., Vol. 14, pp. lxxix–xcvii.

3d Report, Nov. 28, 1896, House Doc. No. 5, 54th Cong., 2d Sess., Vol. 12, pp. cl–clv.

4th Report, Oct. 11, 1897, House Doc. No. 5, 55th Cong., 2d Sess., Vol. 12, pp. cxvii–cxl.

5th Report, Oct. 3, 1898, House Doc. No. 5, 55th Cong., 3d Sess., Vol. 15, pp. 1051–1090.

6th Report, Sept. 1, 1899, House Doc. No. 5, 56th Cong., 1st Sess., Vol. 19, pp. 3–178.

7th Report, Sept. 1, 1900, House Doc. No. 5, 56th Cong., 2d Sess., Vol. 28, pp. 5–79.

8th Report, Oct. 1, 1901, House Doc. No. 5, 57th Cong., 1st Sess., Vol. 24, pp. 5–221.

9th Report, July 20, 1902, House Doc. No. 5, 57th Cong., 2d Sess., Vol. 18, pp. 180–217.

10th Report, Sept. 30, 1903, House Doc. No. 5, 58th Cong., 2d Sess., Vol. 20, pp. 1–190.

11th Report, Oct. 15, 1904, House Doc. No. 5, 58th Cong., 3d Sess., Vol. 20, pp. 1–198.

12th Report, June 30, 1905, House Doc. No. 5, 59th Cong., 1st Sess., Vol. 19, pp. 579–640.

failure of the tribal governments, and showing that the principle of the treaties, which was that the lands of the several nations should be held in common for the equal benefit of the citizens, was so far departed from in practice that a few energetic men had been enabled to appropriate to their exclusive use almost the entire property of the Territory that could be rendered profitable and available. "In one of these tribes, whose whole territory consists of but 3,040,000 acres of land, within the last few years laws have been enacted under the operation of which 61 citizens have appropriated to themselves and are now holding for pasturage and cultivation 1,237,000 acres. This comprises the arable and greater part of the valuable grazing lands belonging to that tribe. . . . In another of these tribes, under similar legislation, vast and rich deposits of coal of incalculable value have been appropriated by the few, to the exclusion of the rest of the tribe and to the great profit of those who operate them and appropriate their products to their individual use." It was further pointed out that towns of considerable importance, with permanent improvements of great value, had been built upon lands which could not be granted in severalty to the inhabitants. In the 2d Report, pp. lxxxvii, xciii, the substance of the above statements was reiterated with emphasis. And in the 4th Report, dated October 11, 1897, and submitted to Congress shortly before the consideration of the Curtis Bill, reference was made to the pending agreements with the Choctaws and Chickasaws, and with the Creeks (these were rejected by the Indians before the Curtis Bill was passed), and attention was again called (p. cxxi) to "the condition to which these Five Tribes have been brought by their wide departure in the administration of the governments which the United States committed to their own hands, and in the uses to which they have put the vast tribal wealth with which they were intrusted for the common enjoyment of all their peo-

ple. . . . Longer service among them and greater familiarity with their condition have left nothing to modify either of fact or conclusion in former reports, but on the contrary have strengthened convictions that there can be no cure of the evils engendered by the perversion of these great trusts but their resumption by the Government which created them." From these reports it also appears that while there was a strong sentiment among the Indian natives favorable to the subdivision of the tribal lands into individual holdings, the principal chiefs and most influential citizens were at first opposed to any concession threatening the permanence of the communal or tribal titles.

The first agreement negotiated with the Creeks was dated September 27, 1897, and in unamended form is found in the 4th Report, p. cxxix. It provided that every Creek citizen should have an allotment of 160 acres of the tribal lands, for which he should receive a patent conveying to him the tribal title; that land should be set apart for religious and educational institutions, for public buildings, and for cemetery purposes; that the town lots should be appraised—land and improvements separately—and that the owners of the improvements might buy the land; and that the balance of the tribal lands should be appraised and sold at auction, and the proceeds put into the Treasury of the United States and used for the purpose of equalizing the allotments with respect to value. The Commission say in their 5th Report, dated October 3, 1898 (p. 1052), that this agreement "was rejected by the [Creek] council, the Chief, Isparhecher, some of his friends and other persons interested in leases obtained from the nation, opposing the changes contemplated in it." This rejection was prior to the passage of the Curtis Act.

Even before the first report of the Commission, the attention of the Senate of the United States was especially drawn to affairs in the Indian Territory, and a select committee was sent there to make an investigation. They

reported under date May 7, 1894, expressing views closely agreeing with those afterwards expressed by the Dawes Commission. And the House Committee report that accompanied the Curtis Bill was to the same effect in substance.

We have set forth in the margin extracts from (a) the Senate Committee report just mentioned, (b) the House Committee report, and (c) the Bill as enacted into law, the latter selected to show how its provisions were directed to the mischiefs pointed out in the reports. The italics are ours.[1]

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[1] EXTRACTS FROM SENATE COMMITTEE REPORT No. 377, May 7, 1894, 53d CONG., 2d SESS., VOL. 5.

"The theory of the Government was when it made title to the lands in the Indian Territory to the Indian tribes as bodies politic that the title was held for all of the Indians of such tribe. *All were to be the equal participators in the benefits to be derived from such holding. But we find in practice such is not the case.* A few enterprising citizens of the tribe, frequently not Indians by blood but by intermarriage, have in fact become the practical owners of the best and greatest part of these lands, while the title still remains in the tribe—theoretically for all, yet in fact the great body of the tribe derives no more benefit from their title than the neighbors in Kansas, Arkansas, or Missouri. According to Indian law (doubtless the work of the most of the enterprising class we have named) an Indian citizen may appropriate any of the unoccupied public domain that he chooses to cultivate. In practice he does not cultivate it, but secures a white man to do so, who takes the land on lease of the Indian for one or more years according to the provision of the law of the tribe where taken. The white man breaks the ground, fences it, builds on it, and occupies it as the tenant of the Indian and pays rental either in part of the crop or in cash, as he may agree with his landlord. Instances came to our notice of Indians who had as high as 100 tenants, and we heard of one case where it was said the Indian citizen, a citizen by marriage, had 400 holdings, amounting to about 20,000 acres of farm land. We believe that may be an exceptional case, but *that individual Indians have large numbers of tenants on land not subdued and put into cultivation by the Indian, but by his white tenant, and that these holdings are not for the benefit of the whole people but of the few enterprising ones, is admitted by all.* The

The Curtis bill, as introduced in the House, did not contain the provisions of the present §§ 29 and 30 (30 Stat. 505, 514), ratifying, with amendments, and sub-

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monopoly is so great that in the most wealthy and progressive tribe your Committee were told that 100 persons had appropriated fully one-half of the best land. This class of citizens take the very best agricultural lands and leave the poorer land to the less enterprising citizens, who in many instances farm only a few acres in the districts farthest removed from the railroads and the civilized centers. As we have said, *the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians*, and the question arises what is the duty of the Government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the Government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights. . . . We do not care to at this time suggest what, in our judgment, will be the proper step for Congress to take on this matter, for the commission created by an act of Congress, and commonly known as the Dawes Commission, is now in the Indian Territory with the purpose of submitting to the several tribes of that Territory some proposition for the change in the present very unsatisfactory condition of that country. We prefer to wait and see whether this difficult and delicate subject may not be disposed of by an agreement with the several tribes of that Territory. But if the Indians decline to treat with that Commission and decline to consider any change in the present condition of their titles and government the United States must, without their aid and without waiting for their approval, settle this question of the character and condition of their land tenures and establish a government over whites and Indians of that Territory in accordance with the principles of our constitution and laws."

EXTRACTS FROM HOUSE COMMITTEE REPORT, March 1, 1898, accompanying the Curtis Bill, (House Rep. No. 593, 55th Cong., 2d Sess., Vol. 3).

"The Committee on Indian Affairs, to whom was referred the bill (H. R. 8581) for the protection of the citizens of the Indian Territory and for other purposes, respectfully report:

"On account of the importance of the questions involved and the many interests affected by the measure, the question was submitted to a sub-committee of five, who invited a subcommittee of three from

mitting to the approval of the members of the respective tribes, the Atoka agreement and the Creek agreement of September 27, 1897, then recently rejected by the Indians.

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the Committee on Indian Affairs in the Senate to join them. The subject was considered by that joint committee for several days and then by the full Committee on Indian Affairs in the House, and after the most careful investigation, your committee recommended the passage of the bill.

"Your committee believes that it has, by this bill, provided a way by which many of the evils existing in the Indian Territory may be corrected.

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"*It appears that the title to lands in the Indian Territory has been conveyed by patent to the tribes, and can not be taken from them without their consent.* There are about 20,000,000 acres of land thus owned. It is rich in mineral deposits, and contains a large area of splendid farming and grazing land. . . .

"*For the last few years the Dawes Commission has been endeavoring to secure agreements with the various tribes, but so far there has been little accomplished.* Agreements were made with the commissioners of the several tribes—all, in fact, except the Cherokees—but the Creek agreement was rejected by the tribe when the vote was taken upon it. . . . *In view of the fact that it is now impossible to secure agreements with the tribes, and the fact that the title is in the tribe, your committee has provided for the allotment of the exclusive use and occupancy of the surface of the lands of each of the nations; but all valuable oil, coal, asphalt, mineral deposits, and town sites are reserved from allotments.*

"*Your committee found that while under treaty provisions the lands of each tribe were to be held for the use and benefit of each of its members, yet the truth is that the lands are in the possession of a very few; and while some of the more powerful members have in their possession and under their control thousands of acres, the poorer class of Indians are unable to secure enough lands for houses and farms; and your committee has provided in this bill for a division of the use of the surface of the lands, so that each and every member of the tribes will be placed in possession of his share of the common lands. We believe this to have been the intent of all parties when the treaty was made.*

"Your committee was convinced that there are many rich deposits of coal and other minerals in said Territory, and that the tribes are not deriving the benefits therefrom that they should derive, but that individual members, and those holding leases from them, are deriving

These were added as a Senate amendment, perhaps at the suggestion of the Dawes Commission, for it appears from their 5th Report, p. 1053, that they were in Washington

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more than their share of the profit, it has provided that all valuable mineral deposits be reserved to the tribes and be set aside as incapable of allotment, and that such mineral deposits be in the future leased under rules and regulations prescribed by the Secretary of the Interior. . . .

"Your committee fully appreciates the important problems involved, and it believes this measure, if enacted into law, will do much to settle those problems. *It will settle the intruder question, protect the so-called common Indians by allotting to them their right to use and occupy their part of the lands; it will break up the monopoly of lands which has reached enormous proportions in the Territory; it will secure to the tribes the income from the rich mineral deposits, and prevent that which rightfully belongs to them from being used by a few individuals;* it will assist in establishing schools and churches; it authorizes the laying out of cities and towns, and gives them power to enact and enforce ordinances; it will insure the people of that country the protection and relief to which they are entitled, and, at the same time, it protects the interests of the various tribes."

Extracts from Curtis Act (c. 517, 30 Stat. 495).

"Sec. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under Acts of Congress, and known as the 'Dawes Commission,' *shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof,* considering the nature and fertility of the soil, location, and value of same; but all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt, or mineral deposits; . . . When such allotment of the lands of any tribe has been by them completed, said commission shall make full report thereof to the Secretary of the Interior for his approval; . . . *provided further,* that whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home, if the holder so desires. . . . *Provided further, that the lands allotted shall*

coöperating with Congress respecting this legislation. Section 11, however, in substantially its final form, was a part of the original bill. Sections 16, 17, and 23, also, but in somewhat different form, were in the bill as introduced.

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be nontransferable until after full title is acquired and shall be liable for no obligations contracted prior thereto by the allottee, and shall be nontaxable while so held.

"SEC. 12. That when report of allotments of lands of any tribe shall be made to the Secretary of the Interior, as hereinbefore provided, he shall make a record thereof, *and when he shall confirm such allotments the allottees shall remain in peaceable and undisturbed possession thereof, subject to the provisions of this Act.*

"SEC. 13. That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals in said Territory, and all such leases shall be made by the Secretary of the Interior; and any lease for any such minerals otherwise made shall be absolutely void. . . .

"SEC. 15. That there shall be a commission in each town for each one of the Chickasaw, Choctaw, Creek, and Cherokee tribes. . . . Said commissions shall cause to be surveyed and laid out town sites where towns with a present population of two hundred or more are located, . . . *And all town lots shall be appraised by said commission at their true value, excluding improvements; and separate appraisements shall be made of all improvements thereon;* and no such appraisement shall be effective until approved by the Secretary of the Interior. . . . *The owner of the improvements* upon any town lot, other than fencing, tillage, or temporary buildings, *may deposit in the United States Treasury*, Saint Louis, Missouri, *one-half of such appraised value; . . . and such deposit shall be deemed a tender to the tribe of the purchase money for such lot.* If the owner of such improvements on any lot fails to make deposit of the purchase money as aforesaid, then such lot may be sold in the manner herein provided for the sale of unimproved lots; . . . *All town lots not improved as aforesaid shall belong to the tribe*, and shall be in like manner appraised, and, after approval by the Secretary of the Interior, and due notice, *sold to the highest bidder* at public auction by said commission, but not for less than their appraised value, unless ordered by the Secretary of the Interior; and *purchasers may in like manner make deposits of the purchase money with like effect, as in case of improved lots. . . . The person authorized by the tribe or tribes may execute or deliver to any such*

It is evident that at the time this law was enacted, Congress entertained serious doubts as to its constitutional power to interfere with the tribal lands of the Five Civ-

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purchaser, without expense to him, a deed conveying to him the title to such lands or town lots; and thereafter the purchase money shall become the property of the tribe; and all such moneys shall, when titles to all the lots in the towns belonging to any tribe have been thus perfected, be paid per capita to the members of the tribe. . . .

"SEC. 16. That it shall be *unlawful for any person, after the passage of this Act,* except as hereinafter provided, *to claim, demand, or receive, for his own use* or for the use of anyone else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or *any rents on any lands or property belonging to any one of said tribes or nations in said Territory,* or for anyone to pay to any individual any such royalty or rents or any consideration therefor whatsoever; . . . *Provided,* That where any citizen shall be in possession of only such amount of agricultural or grazing lands as would be his just and reasonable share of the lands of his nation or tribe and that to which his wife and minor children are entitled, he may continue to use the same or receive the rents thereon until allotment has been made to him. . . .

"SEC. 17. *That it shall be unlawful for any citizen of any one of said tribes to inclose or in any manner, by himself or through another, directly or indirectly, to hold possession of any greater amount of lands or other property belonging to any such nation or tribe than that which would be his approximate share of the lands belonging to such nation or tribe and that of his wife and his minor children as per allotment herein provided;* and any person found in such possession of lands or other property in excess of his share and that of his family, as aforesaid, or having the same in any manner inclosed, at the expiration of nine months after the passage of this Act, shall be deemed guilty of a misdemeanor. . . .

"SEC. 23. *That all leases of agricultural or grazing land belonging to any tribe made after the first day of January, eighteen hundred and ninety-eight, by the tribe or any member thereof shall be absolutely void,* and all such grazing leases made prior to said date shall terminate on the first day of April, eighteen hundred and ninety-nine, and all such agricultural leases shall terminate on January first, nineteen hundred; *but this shall not prevent individuals from leasing their allotments when made to them as provided in this Act, nor from occupying or renting their proportionate shares of the tribal lands until the allotments herein provided for are made.*"

ilized Tribes or to overthrow the tribal governments without the consent of the Indians. Some of the doubts were afterwards resolved by the decisions rendered by this court in *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 489, 491, and *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307. From what has been said and quoted, however, it very clearly appears that the purpose of Congress in the allotment provisions of § 11, and in those quoted from §§ 16, 17, and 23, which should be read in the same connection, was not to interfere at all with the tribal title to the allotted land unless with the consent of the tribe, manifested either by approval of the Agreement for that purpose submitted, or by tribal action under § 15 of the Act of 1893; that the Curtis Act had for its object the administration of the trusts imposed upon the several tribes by the early treaties, and which the tribes had failed to enforce, namely, that the beneficial use of the tribal domain should be enjoyed equally by all the members of the tribe, and that monopolization of it in any form or by any means should be prevented. Section 15, providing for the sale of town lots, improved or unimproved, went somewhat further, and permitted the purchaser to deposit the purchase price in the United States Treasury by way of tender to the tribe. A clause was included—permissive, but probably not obligatory upon the tribe—that "the person authorized by the tribe or tribes may execute or deliver to any such purchaser, without expense to him, a deed conveying to him the title to such lands or town lots; and thereafter the purchase money shall become the property of the tribe," etc. This plan recognized the fact, referred to in the 1st Report of the Dawes Commission, that towns had been built up with the consent of the tribes, and valuable dwellings and other improvements constructed, without title and without means of acquiring title to the land. With the town lot question we have no present concern, except as § 15, by contrast, throws light upon § 11 and the

other compulsory provisions of the Act respecting allottable lands. Section 11, we repeat, conferred only a personal right to the exclusive use and occupancy of the surface, to be enjoyed by persons identified by the Dawes Commission as properly entitled to a place upon the citizenship rolls.

The argument that this gave to the Creek Indians less than they were already entitled to under their own laws is wide of the mark. We must not be understood as conceding that the Creek laws conferred any inheritable right, except to the improvements upon the land; certainly, no ampler right could be conferred as against the United States, in view of the limitations imposed upon the tribal title by the terms of the patent held by the tribe. But, passing this question, the chief difficulty was not in the Creek laws, but in the mode of their administration or mal-administration. And the manifest purpose of the Curtis Act was not to displace but to recognize the communal titles, and to administer the use of lands for the equal benefit of the members of the tribes according to the true intent and meaning of the early treaties; the effort being to do what the tribal governments ought to have done but were failing to do. That this meaning was placed upon the Act by the Secretary of the Interior will appear from the administrative regulations issued to the Dawes Commission, excerpts from which are set forth in the marginal note, *infra*.

Goat v. *United States*, 224 U. S. 458, 469, is not in conflict with the view above expressed. That case dealt with the right of Seminole Freedmen to convey the lands allotted to them in severalty pursuant to the agreement confirmed by the Act of July 1, 1898 (c. 542, 30 Stat. 567), and turned upon the question whether the restriction upon alienation imposed by that agreement had been violated. It was argued that the interest of the allottee was not of such a character as to be susceptible of trans-

fer; and—notwithstanding the provision in the agreement that each allottee should have "the sole right of occupancy of the land so allotted to him"—the court rejected the argument on the ground that the allotments constituted the respective shares of the allottees in the tribal property and were set apart to them as such, and that while the execution of the deeds was deferred, each had meanwhile a complete equitable interest in the land allotted to him. But this was because it was so agreed between the United States and the tribe, and has no bearing upon the proper construction of § 11 of the Curtis Act, which was intended to have effect without consent of the tribe, and was enacted at a time when it was seriously doubted by Congress whether without such consent the tribal title could be divested in favor of an allottee.

In *Welty* v. *Reed*, 219 Fed. Rep. 864, 867, the Circuit Court of Appeals for the Eighth Circuit, in passing upon another question, expressed the view that a Curtis Act allottee had an inheritable estate or interest. This seems to have been based upon a mistaken view of what was decided in *Goat* v. *United States*.

From what we have said it results that, when Agnes Hawes, having received an allotment under the Curtis Act, died in June, 1900, without other interest in the land, her interest died with her, and there was nothing upon which the Arkansas law of descent could operate. This would have been so, even had her allotment received the approval of the Secretary of the Interior under § 12 of the Curtis Act. As will presently appear, however, it must be deemed to have been a mere temporary or provisional allotment, not final even for the purposes of the Curtis Act.

We are next to consider the effect upon such an allotment of the subsequent adoption of the Original Creek Agreement (Act of March 1, 1901, c. 676, 31 Stat. 861). But, first, it will be well to briefly review what had been

done in the meantime under the Curtis Act, in order that we may the better understand the situation with which Congress dealt in 1901.

From the 6th Report of the Dawes Commission, p. 9, it appears that while the Atoka Agreement, as proposed by the Curtis Act, was ratified by the Choctaw and Chickasaw Nations at a special election held August 24, 1898, the amended Creek Agreement of September 27, 1897, was not ratified. "Chief Isparhecher of the Creeks was slow to call an election, and it was not until November 1, 1898, that the agreement with that tribe was submitted in its amended form for ratification. While no active interest was manifested, the full-bloods and many of the freedmen were opposed to the agreement and it failed of ratification by about one hundred and fifty votes. As a result the Act of June 28, 1898, known as the Curtis Act, became effective in that nation."

The same report shows (p. 18) that the Commission found it impracticable to establish allotment offices in all five of the tribes pursuant to the departmental regulations of October 7, 1898 (set forth below, in the margin), until a proper system and method of procedure should have been devised, established in one tribe, and demonstrated by experience as satisfactory. "The initiatory work being experimental and requiring the close attention of the Commission, such office was established at Muskogee, in the Creek Nation, where the general office of the Commission is located, thus enabling the Commission to better superintend its operations. Due notice was given by publication, as required by the rules of the secretary, and the office opened for the selection of allotments on April 1, 1899." . . . (Page 20): "Up to and including June 30, 1899, three thousand eight hundred selections were filed on in the Creek Nation."

The 7th Report, p: 31, stated that "Up to and including June 30, 1900, there have been 10,000 selections filed

in the Creek Nation, amounting approximately to two-thirds of the total number of citizens, and covering the most thickly settled and improved lands of the nation."

These selections were treated as "preliminary," and the allotments as "temporary." The difficulties to be overcome before complete and final allotment were great and unprecedented. (7th Report, p. 12.) For instance, the Creek citizenship rolls had not been completed at the time of the making of the Agnes Hawes allotment, nor were they, indeed, until some time in the year 1902. It is also to be noted that § 11 of the Curtis Act does not authorize allotments of 160 acres or any other specified area, but contemplates a valuation of the allottable lands so as to give to each citizen his fair and equal share in value. Evidently, the Secretary of the Interior and the Dawes Commission realized that to postpone the beginning of allotments until the roll of citizenship of any tribe should be "fully completed as provided by law"—there being disputes without number respecting questions of citizenship, and a mass of litigation arising out of them, as witness *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 467, which involved 166 appeals from the United States courts in the Indian Territory to this court taken under the Act of July 1, 1898, c. 545, 30 Stat. 571, 591—would have postponed indefinitely the inauguration of the allotment policy in the Indian Territory. The same result would have followed if allotment had been required to await a valuation, lot by lot, of all the allottable lands. But the immediate inauguration of the policy of allotment was urgently called for, not only to break up the system of land monopolies, productive of so much injustice to the individual Indians, but also to educate the Indians in the benefits to be derived from separate occupancy and enjoyment of the land, and thereby to gain popular support for the agreements that

were so earnestly desired as the only permanent relief from an intolerable situation.

There were over 3,000,000 acres of land in the domain of the Creek Nation, and approximately 16,000 Creek Indians and Freedmen. It was easily to be seen that the tribe possessed sufficient allottable land to permit each citizen to take 160 acres, assuming the land values were approximately uniform. There were many reasons of convenience and of sentiment indicating the quarter section as a proper provisional allotment. It ran with the lines of the Government surveys; it was the quantity permitted to be taken up by a citizen of the United States under the preëmption and homestead laws (Rev. Stat., §§ 2259, 2289); it was the quantity proposed to be allotted in the Choctaw-Chickasaw Treaty of 1866, as has been stated; it was the quantity allotted to an Indian, the head of a family, under the general allotment act of 1887 (c. 119, 24 Stat. 388); it was this area that was pointed out as proper to be allotted to an individual citizen of the Five Civilized Tribes by § 15 of the Act of 1893, c. 209, 27 Stat. 645; and, finally, by the amended Creek Agreement of September 27, 1897 (previously rejected by the tribe, but by the Curtis Act required to be resubmitted), 160 acres were to be allotted to each citizen, the residue of allottable lands to be sold in tracts not exceeding that area.

And so it is not surprising that the Secretary of the Interior, in establishing regulations for the selection of allotments under the Curtis Act, included a clause permitting each Creek citizen to take 160 acres. Extracts from these regulations are set forth in the margin.[1] They

[1] EXTRACTS FROM RULES AND REGULATIONS PRESCRIBED BY THE SECRETARY OF THE INTERIOR FOR THE SELECTION AND RENTING OF PROSPECTIVE ALLOTMENTS UNDER THE CURTIS ACT. (Sixth Annual Report of Commission, House Doc. No. 5, 56th Cong., 1st Sess., Vol. 19, p. 81, etc.)

"*It is the intention of this law* [the Curtis law] *to require every member*

contemplated temporary allotments, intended to be approximately equal to what each citizen would get from final allotment.

Meanwhile the Dawes Commission, after the rejection by the Creeks of the agreement submitted pursuant

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of any tribe holding in his possession lands in excess of his 'just and reasonable share of the lands of his nation or tribe, and that to which his wife and minor children are entitled,' to relinquish possession thereof in order that other members of the tribe may enter thereon and make homes preparatory to the allotment so contemplated. . . .

"In order, therefore, to give effect to the provisions of said Act according to its design, and *to enable every member of each tribe to select and to have set apart to him lands to be allotted to him in amount approximating his share*, as aforesaid, the Commission to the Five Civilized Tribes is instructed, as a means preparatory to and in aid of the duty of allotment of the lands of said tribes required of it by said Act, to proceed as early as practicable to establish an office within the territory of each tribe, provided with proper and suitable records, including a copy of the United States survey of the lands of the tribe, for the purpose of registering each and every selection of lands made by any member of the tribe for his allotment; and in order to make such selection of lands by any member of any tribe effective and valid such member, or the head of each family, shall be required to appear in person at the office within his tribe and to make application . . . *and thereafter he may occupy, control, and rent the same for any period not exceeding one year, by any one contract, until lands are in fact allotted to him under terms of said Act, and will be protected therein by the government from interference by all other persons whomsoever.* . . .

"Selections of land may be made by members of the several tribes in quantities not to exceed 160 acres to each Creek, 80 acres to each Cherokee, 240 acres to each Choctaw and each Chickasaw, and 40 acres to each Choctaw and each Chickasaw Freedman.

"And the balance of the lands belonging to each tribe shall be left uninclosed and open for the common use of all members of the tribe until final allotment, and then be divided among them according to the provisions of said Act of Congress and agreement, where agreements have been ratified, so that every member shall have his fair and equal share of all the lands of his tribe.

"After the 1st day of April, 1899, any member of any tribe may enter upon and occupy any lands which have not already been,

to § 30 of the Curtis Act, negotiated another agreement with them on February 1, 1899, which, although ratified by the tribe on February 18, was rejected by Congress. 6th Report, pp. 10, 59. Still another agreement was negotiated under date of April 8, 1900 (7th Report, pp. 13, 47), which, with some amendments, was ratified by Congress in behalf of the United States by the act of March 1, 1901 (31 Stat. 861). It was subsequently ratified by the Creek Nation on May 25, 1901 (8th Report, pp. 11, 47; 32 Stat. 1971), and is known as the Original Creek Agreement. It provided for a general allotment of all the tribal lands, except town sites, etc., 160 acres being allotted to each citizen; town lots to be sold; deeds or patents to be made to allottees and purchasers, conveying the tribal title; the residue of lands and all funds arising under the agreement to be used for equalizing allotments; and any deficiency to be supplied out of other funds of the tribe, "so that the allotments of all citizens may be made equal in value, as nearly as may be."

The sections especially bearing upon the present inquiry are §§ 6, 7, and 28.[1] These and the other provisions of the

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hereinbefore provided, selected and occupied by another member of the tribe, whether such lands be improved or inclosed or not. . . ."

Promulgated October 7, 1898.

AMENDMENTS TO RULES AND REGULATIONS of October 7, 1898, made April 7, 1899.

"Each Creek citizen may select, in manner provided in said rules, 160 acres of land from the Creek domain, and each Cherokee citizen may so select 80 acres from the Cherokee domain; such selections to be from any lands upon which they now own improvements or from any lands not occupied by or in the possession of any other citizen of the tribe to which the applicant belongs. . . ."

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[1] EXTRACTS FROM ORIGINAL CREEK AGREEMENT, Act of March 1, 1901 (c. 676, 31 Stat. 861).

"6. All allotments made to Creek citizens by said Commission prior to the ratification of this agreement, as to which there is no contest,

Agreement respecting the allotment of lands show that it was the intention of the parties to accept and confirm the allotment work already performed by the Dawes Commission, with the same effect as if it had been done after the ratification of the agreement. This was to adopt what had been done in dividing the lands so far as it had been done consistently with the provisions of the Agreement, and thus save not only the time and expense of the

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and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said Commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said Commission.

"7. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

"Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above. . . .

"The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation."

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"28. No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one

allotment work, but the great confusion and hardship that would necessarily have resulted if the attempt had been made to vacate upwards of 10,000 allotment selections already made, involving the greater part of the improved lands of the Nation and a large majority of the citizens. At the same time the Curtis Act allotments were brought under the provisions of the Agreement respecting the conveyance of the tribal title, etc. We see no evidence of a purpose to put allotments previously made upon a different basis, in any respect, from allotments thereafter to be made; on the contrary, the phrase used in § 6 is that the confirmed allotments "shall, as to appraisement and all things else, be governed by the provisions of this agreement." We construe the section to mean that allotments theretofore made, if not inconsistent with the provisions of the Agreement, were to be treated the same as if made after the ratification of the Agreement; and this includes the designation of the beneficiaries in case of the death of an allottee.

There were reasons for an express ratification of the allotment work previously done by the Commission. As already pointed out, the allotments had been tentatively and provisionally made in tracts of 160 acres, upon the order of the Secretary of the Interior, and without express authorization of acreage allotments in the Curtis Act; they had been made before completion of the membership rolls and without appraisement of the lands; and, of course, they had been made without the consent of the tribe.

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of the [Curtis Act] . . . shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly. . . ."

But it is argued by plaintiffs in error that there is no provision of the Agreement that can be construed to apply the Creek law of descent to Curtis Act allotments; that § 28 provides for an allotment to the heirs according to Creek law in two cases only, (a) where a citizen living on April 1, 1899, died *prior* to the ratification of the agreement "*before* receiving his allotment of lands and distributive share," etc.; and (b) where the citizen living April 1, 1899, died *after* the ratification of the agreement "*before* receiving his allotment," etc. It is insisted that Agnes Hawes did not fall within either of these classes, since she died *before* the ratification of the agreement but *after* receiving her allotment. It is also insisted that § 7 put in force the Creek law of descent only with respect to the homestead 40 acres; and since the Curtis Act had no provision for homesteads the allotment, when made, was not impressed with homestead characteristics, and no part of the land allotted to heirs was impressed with such characteristics by the Agreement. The result of this argument, if sound, would be that all Curtis Act allotments (over 10,000 in number, and covering more than 1,600,000 acres; 8th report, p. 32), and all allotments made after the ratification of the Original Agreement except homestead allotments under § 7 and a limited class of allotments under § 28, would descend according to the Arkansas laws of descent, while the exceptional allotments, comparatively of little importance, would descend according to the Creek laws.

Even if this construction accorded with the strict letter of the Agreement, it savors too much of refinement to be accepted as an exposition of the true intent and meaning of an engagement made between the Government of the United States and an Indian tribe. *Jones* v. *Meehan*, 175 U. S. 1, 10; *Choate* v. *Trapp*, 224 U. S. 665, 675. The adoption of the Creek laws of descent was a concession to the Indians, who were of course more familiar with their

own laws than with Chapter 49 of Mansfield's Digest, and were no doubt materially influenced in giving consent to the treaty by the fact that thereafter their lands would descend just as their personal property had descended in former times. To confine the operation of the Creek laws to the few and exceptional cases, and leave the Arkansas laws in effect respecting the greater part of the tribal domain, would be to keep the word of promise to the ear, while breaking it to the hope. At the same time, it would be inconsistent with the purpose expressed in § 6 to put Curtis Act allotments on a parity with allotments afterwards made. The confusion that would result from applying two variant systems of law at one and the same time, with respect to lands lying side by side and otherwise indistinguishable, is of course apparent. The suggested construction must be rejected.

In our opinion the equitable title to the Agnes Hawes allotment was vested in her heirs according to Creek law by the clear meaning of § 28, which says: "All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled . . . shall be placed upon the rolls . . . and if any such citizen has died since that time . . . before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled if living shall descend," etc. Although she had been placed in possession of an allotment, she had not in her lifetime "received" it, in the sense of the Agreement, for this contemplated ownership in fee, and she had received only a provisional surface right. Besides, while § 6 in confirming the allotment brought it under those provisions of the Agreement that contemplated a patent in fee, it was still only a partial dividend out of the property of the tribe. There remained something else contemplated by the Agreement and not received by Agnes Hawes in her lifetime, namely, her "distributive share of

all the funds of the tribe." Thus we have the precise situation contemplated by § 28, which in that case confers the lands and money, to which she would have been entitled if living, upon her heirs according to Creek law. This accords with the view adopted by the Oklahoma Supreme Court in *Barnett* v. *Way*, 29 Oklahoma, 780, 785. And see *Washington* v. *Miller*, 235 U. S. 422, 425.

Were there doubt of the correctness of this view, and were § 28 as restricted in its effect as is contended by plaintiff in error, the same result would follow from a fairly liberal reading of § 7, such as would have to be adopted in construing an agreement with Indians. That section begins by saying that "Lands allotted to citizens hereunder" shall not be encumbered or sold to secure or satisfy any debt contracted prior to the date of the deed to the allottee, and shall not be alienable within five years from the ratification of the agreement except with the approval of the Secretary of the Interior. Then follow clauses imposing restrictions solely upon the homestead 40 acres, and the section ends by declaring that the homestead shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of the Agreement, but in the absence of such issue "he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, *the land shall descend* to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation." It is reasonable to suppose that the Indians, when giving approval to this agreement, would understand that the land which was thus to descend free from limitation included as well the land to which the limitation had never applied as that to which it had applied, but respecting which it had expired. And they would understand the provisions of § 28 (if limited as is here contended) to apply the laws of descent and distribution of the Creek Nation to allotments made under the peculiar circum-

stances there provided for, in order to bring those allotments into conformity, as to descent and otherwise, with allotments of the general class, including allotments made prior to the ratification of the agreement, which by § 6 were "as to appraisement and all things else" to be governed by the provisions of the agreement. Such was the view expressed by the Supreme Court of Oklahoma in *de Graffenried* v. *Iowa Land & Trust Co.* (1907), 20 Oklahoma, 687, 709–711. In *Bartlett* v. *Okla. Oil Co.*, 218 Fed. Rep. 380, 385, the United States District Court for the Eastern District of Oklahoma passed upon the question of the descent of a Creek allotment held by a full-blood Indian of that tribe who died November 17, 1907, one day after the admission of Oklahoma as a State. It being in dispute whether the Creek law, the Arkansas law, or the Oklahoma law of descent and distribution applied, the court, in the course of a historical review of the legislation of Congress, said (p. 385) that under the Original Creek Agreement the descent of surplus lands was not especially provided for, and therefore was controlled by the laws of Arkansas, in force in the Indian Territory by virtue of the Act of June 7, 1897, and June 28, 1898 (the Curtis Act); but this was clearly *obiter*.

Under either of the views that we have expressed, the Agnes Hawes allotment, if it was uncontested, if it did not include public property, and was not otherwise affected by the Original Creek Agreement, was confirmed by § 6. That it was not among the excepted classes is sufficiently evidenced by the subsequent action of the Dawes Commission in awarding it to the heirs of Agnes. That which had been tentative and provisional, then became by force of the provisions of the Agreement, final and conclusive. The result was to vest a complete equitable title in her "heirs," to be determined according to the Creek laws of descent and distribution; and, upon familiar principles, their interest, being vested, was not divested by the sub-

sequent adoption of the Act of May 27, 1902, c. 888, effective July 1, 1902 (32 Stat. 258; Joint Res. No. 24, 32 Stat. 742), or the Supplemental Creek Agreement (Act of June 30, 1902, c. 1323, § 6, 32 Stat. 500, 501; effective August 8, 1902, 32 Stat. 2021), which substituted the Arkansas laws. (See *Ballinger* v. *Frost*, 216 U. S. 240, 249.) *Sizemore* v. *Brady*, 235 U. S. 441, 448, is distinguishable, because there the allotment in question was not selected or made until after the Supplemental Agreement went into effect.

It is undisputed that according to Creek law the husband was entitled to take a half interest in his wife's property if she died without will, at least in case there were no children. And it is now settled that an intermarried non-citizen husband could inherit under the tribal laws the same as if he were a citizen. *Reynolds* v. *Fewell*, 236 U. S. 58, 63; *Shellenbarger* v. *Fewell*, 236 U. S. 68.

It is perhaps unnecessary to say that the subsequent issue of a patent to the "Heirs of Agnes Hawes," without naming them, conveyed the legal title to those persons upon whom the equitable title was conferred by the Original Agreement.

The restrictions upon alienation contained in the Original Agreement did not apply to allotments made on behalf of deceased members of the tribe. *Skelton* v. *Dill*, 235 U. S. 206, 210. Indeed, all restrictions upon alienation as to allottees not of Indian blood (except minors and except as to homesteads) were removed by the Act of April 21, 1904 (c. 1402, 33 Stat. 189, 204).

Therefore, the conveyance on June 22, 1904, by Ratus Hawes to defendant in error passed to the latter the undivided half interest in the lands in question.

The further point is raised that defendant in error (plaintiff below) was barred from maintaining his present action by a decree dismissing a previous suit, brought by him prior to Statehood in the United States Court for

the Western District of the Indian Territory, against Louis and Peggie Woodward, for a partition of the same land. This contention—equivalent to the plea of *res adjudicata*—was rejected by the state court upon the ground that the partition suit was brought in equity, and was dismissed because the petition showed that the land was held by the defendants adversely to plaintiff, and because he could not maintain an action for partition in equity without first establishing his title by an action in ejectment. The decision was rested upon the authority of numerous cases cited from the Supreme Court of Arkansas—the practice of that State having been put in force in the Indian Territory by act of Congress. We concur in the result, and need add nothing to the reasoning of the state court.

One or two other questions were argued, but they are not within the assignments of error—indeed, were not raised in the court whose judgment is under review.

Judgment affirmed.

TEXAS & PACIFIC RAILWAY COMPANY *v.* MURPHY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 791. Argued April 23, 1915.—Decided June 14, 1915.

Although the shipper may be in control of the car and may be negligent in regard thereto the carrier is not relieved of responsibility and so *held* that:

An employé of the carrier, not guilty of contributory negligence and not charged with notice of the carrier's rules in regard to refrigerator cars may, under the circumstances of this case, be liable for injuries caused by the doors of ice bunker being left open by the shipper in control of the car although the employé knew that the shipper was in such control.

THE facts, which involve the validity of a verdict and judgment for damages recovered by an employé of a carrier, are stated in the opinion.

Mr. F. H. Prendergast for plaintiff:

Where a car loaded with bananas was in charge of a custodian, and had been placed on a bulk track to be unloaded then the shipping rules of the railroad which permitted the custodian to open or close the ventilators to the car, are valid and the railroad would not be liable for an injury caused by the custodian having the ventilators open on top of the car. *Densmore Commission Co.* v. *Duluth R. R.*, 101 Wisconsin, 563; *Gillett* v. *Railroad*, 68 S. W. Rep. 61; *Railroad Co.* v. *Alexander*, 103 Texas, 597; *Schwartz* v. *Erie R. R.*, 106 S. W. Rep. 1188; *Tuttle* v. *Detroit &c. R. R.*, 122 U. S. 189; *Tex. Cent. R. R.* v. *Dorsey*, 30 Tex. App. 381.

The facts proven established the fact that defendant in error did not get on the car to set the brakes nor to perform any duty he owed the railroad, because he had gone five or six feet beyond the brake staff before he fell, and the special charges to that effect should have been given.

If the man in charge of the bananas left the opening on top of the car uncovered, then the railroad company would not be liable and the court erred in its charge to the jury. *Densmore* v. *Duluth R. R.*, 101 Wisconsin, 563; *Densmore* v. *Duluth R. R.*, 77 N. W. Rep. 904; *Gillett* v. *Railroad Co.*, 68 S. W. Rep. 61; *Schwartz* v. *Erie R. R.*, 106 S. W. Rep. 1188; *Tex. Cent. R. R.* v. *Dorsey*, 30 Tex. App. 381.

Mr. S. P. Jones for defendant in error:

The duty of the master to provide for his servant a reasonably safe place in which to work and reasonably safe instrumentalities is an ever present, non-delegable duty and when the same is delegated to another, he thereby becomes the agent or representative of the master for

whose negligence the master is responsible. *Cooper* v. *Robischung Bros.*, 155 S. W. Rep. 1050; *Hough* v. *Railway Co.*, 100 U. S. 213; *Railway Co.* v. *Baugh*, 149 U. S. 386; *Railway Co.* v. *Conway*, 98 S. W. Rep. 1070; *Railway Co.* v. *LaRue*, 27 C. C. A. 363; *Railway Co.* v. *Winton*, 66 S. W. Rep. 477; *Railway Co.* v. *Milam*, 58 S. W. Rep. 735; *Texas Traction Co.* v. *Morrow*, 145 S. W. Rep. 1069; *Toledo Brewing Co.* v. *Bosch*, 41 C. C. A. 482.

The rules relied upon by the Railway Company are not rules governing the switchman's work, but are for the railway agents at stations, conductors in charge of trains, and the messengers or men in charge of the fruit.

If the Railway Company could relieve itself of liability by delegating to the person in charge of the shipment the duty of handling the car, under the rules it would not relieve the company of liability in this case, as the rule providing for the opening of ventilators does not authorize them to be left unprotected, making a pitfall in the path of trainmen, but requires them to be protected by the cover with the ratchet device furnished for that purpose.

The rules do not contemplate that the cover shall be thrown back on the car roof and it is unusual and dangerous for them to be left in that position.

Switchmen have to move fast in doing their work. Defendant in error, a careful switchman, was at the place where it was necessary for him to be.

In support of these contentions, see *Baird* v. *Reilly*, 35 C. C. A. 78; *Cooper* v. *Robischung*, 154 S. W. Rep. 1052; *Grand Trunk Ry.* v. *Tennant*, 14 C. C. A. 190; 3 Labatt on Master and Servant, 1073; *Railway* v. *Baugh*, 149 U. S. 386; *Railway Co.* v. *Herbert*, 116 U. S. 647; *Railway Co.* v. *Peterson*, 162 U. S. 346.

MR. JUSTICE PITNEY delivered the opinion of the court.

Murphy, while in the employ of the Railway Company as a switchman in its yards at Marshall, Texas, fell from a

refrigerator car and received personal injuries, for which he recovered a judgment against the Company in the United States District Court, which was affirmed by the Circuit Court of Appeals, without opinion. According to plaintiff's theory, supported by evidence sufficient to sustain the verdict, the car was standing upon one of the unloading tracks, but in such a position that it required to be occasionally moved in the course of switching operations. It was partially loaded with bananas, and it had at one end an ice bunker with an opening or scuttle in the roof of the car through which the bunker was filled. The opening was surrounded with a casing or coaming, rising somewhat above the surface of the roof, and there was a hinged door or cover fitted to the opening and furnished with a ratchet device for raising it and setting it at any desired angle. Plaintiff went upon the top of the car at night in the course of his duties in order to test the brake and if necessary to set it, so that the refrigerator car could not run down upon the main track. While walking upon the roof of the car and making ready to descend, it being dark, and the signal lantern that he carried furnishing scanty light upon his path, he stepped upon the casing or coaming of the ice bunker, his foot slipped or turned, and he fell to the ground, receiving serious injuries. The hatch cover, it appeared, was on this occasion left wide open, instead of being set at an angle by means of the ratchet, which, according to the evidence, was the proper mode of arranging it when it was desired to ventilate the ice bunker, and would have had the effect of preventing plaintiff from stepping upon the coaming.

Plaintiff's contention was that the Railway Company was negligent in leaving the door of the ice bunker wide open. Defendant insisted that the car was in the charge and control of one Marshall, who was selling bananas from it, and that under the rules prescribed by the company for governing the transportation of bananas Marshall had

a right to have the doors of the ice bunker open or closed, as he preferred. The trial court was requested to charge that the rules of the company governing the transportation of bananas in refrigerator cars were reasonable and binding upon the parties, and if the car in question was handled in accordance with those rules, and if the messenger in charge of the car left the ventilators open, and this caused the plaintiff to fall, he could not recover. This request was refused, and the court charged, on the contrary, that the Railway Company could not escape liability for injuring plaintiff by reason of Marshall's act in leaving the bunker opening uncovered; that the mere fact that Marshall, or somebody acting for him, left it uncovered would not be sufficient to defeat a recovery by the plaintiff; but that the jury could take into consideration the fact of Marshall's control of the car in determining whether the defendant company, on the occasion in question, was guilty of negligence directly or proximately contributing to plaintiff's injury, and also in determining whether plaintiff was guilty of contributory negligence in walking along the car in the manner he did at the time of his injury. We think this was sufficiently favorable to defendant. So far as appears, there was nothing to show that plaintiff had notice of the company's rules respecting the care of perishable freight in refrigerator cars, or that they entered into the contract of employment. Assuming he was charged with notice of Marshall's control of the car and knew that this must interfere to some extent with the Railway Company's care for plaintiff's safety, this was no more than a circumstance in the case, and could not properly be treated as conclusively showing a want of responsibility on the part of defendant.

The other contentions of plaintiff in error are sufficiently answered by referring to *Texas & Pacific Ry.* v. *Rosborough*, 235 U. S. 429, and cases cited.

Judgment affirmed.

PRODUCERS OIL COMPANY *v.* HANZEN.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 165. Submitted March 3, 1915.—Decided June 14, 1915.

The effect of riparian rights, attached to land conveyed by patent of the United States, depends upon the local law.

As a general rule, meanders are not to be treated as boundaries and when the United States conveys a tract of land by patent referring to an official survey which shows the same bordering on a navigable river, the purchaser takes title up to the water line.

Where the facts and circumstances, however, affirmatively disclose an intention to limit the grant to actual traverse lines, these must be treated as definite boundaries; and a patent to a fractional section does not necessarily confer riparian rights because of the presence of meanders.

Where, as in this case, the survey of improved lands was made at the express request of the occupant to whom they were subsequently patented, and the grant specified the number of acres, and other circumstances also indicated that only the lands conveyed were those within the traverse lines, the patent of the United States conferred no riparian rights but simply conveyed the specified number of acres.

In a controversy between individuals as to the extent of the land conveyed by a patent of the United States, and to which the United States is not a party, nothing in the opinion or judgment should be taken to prejudice or impair any of the rights of the United States in the lands affected.

61 So. Rep. 754, affirmed.

THE facts, which involve the title to property conveyed by a United States patent and the construction of such patent and the amount of land conveyed thereby, are stated in the opinion.

Mr. Edgar H. Farrar for plaintiff in error:

The action is possessory, and no question of title is involved, or can be decided, because not in issue.

Actual possession of part of an estate, with title to the whole, is possession of the whole, and gives the holder of the title the right to maintain a possessory action as

to the part not actually occupied or physically possessed. *Sallier* v. *Bartlett*, 113 Louisiana, 400; *Jones* v. *Gossett*, 115 Louisiana, 926; *Leonard* v. *Garrett*, 128 Louisiana, 542.

In an action to protect constructive possession of part of an estate not in actual possession, titles are averred and put in issue solely to show the nature and extent of possession. *Mott* v. *Hopper*, 116 Louisiana, 629.

The mining laws of the United States do not grant the right to search for minerals in lands which are the property of individuals, nor authorize any disturbance of the title or possession of such lands. *Del Monte Mining Co.* v. *Last Chance Co.*, 171 U. S. 55.

Defendants, not having discovered any oil on the lands seized by them, and posted and surveyed as a mining claim, before doing such acts, got no rights of possession or any other rights under the mining laws of the United States as against the constructive possession of such lands by plaintiff. Discovery must precede location. Rev. Stat., § 2320; *Enterprise Co.* v. *Rico-Aspen Co.*, 167 U. S. 168; *Calhoun Mining Co.* v. *Ajax Co.*, 182 U. S. 499; *Mining Co.* v. *Tunnel Co.*, 196 U. S. 337.

Discovery of oil after this suit was brought, and after the land was seized under a writ of sequestration, and released by the defendants on bond, does not relieve them from being trespassers; their rights must be determined as of the time when they invaded the premises.

Defendants, being mere trespassers on lands *prima facie* conveyed to the plaintiff, and covered by the patent and plat of the United States to plaintiff's vendors, and at the time of the trespass in the constructive possession of the plaintiff, cannot be heard to contest the plaintiff's claim to the property under the patent of the United States or the survey and plat on which the patent is based. *Bonis* v. *James*, 7 Rob. La. Reports, 149; *Stephenson* v. *Goff*, 10 Rob. 99; *Whitaker* v. *McBride*, 197 U. S. 510.

The patent to plaintiff's vendor, being based on a plat

showing a meander or traverse line all around the border of the bounding stream, drawn in accordance with the field notes, and showing no surveyed land between the meander line and the water's edge, conveys to the grantee any land actually existing between the meander line and the water line. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Mitchel* v. *Smale*, 140 U. S. 406, 414; *Hardin* v. *Jordan*, 140 U. S. 371; *Horne* v. *Smith*, 159 U. S. 40; *Whitaker* v. *McBride*, 197 U. S. 510; *Forsyth* v. *Smale*, 7 Biss. 201; *S. C.*, Fed. Cas. No. 4950; *Grand Rapids & Ind. R. R.* v. *Butler*, 159 U. S. 87; *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447.

Grants of the United States for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the State in which the lands lie. *Hardin* v. *Jordan, supra; Whitaker* v. *McBride, supra.*

If the Federal grant is, by its terms, riparian, then the local law determines the rights of the riparian grantee.

The action of the state court in ignoring the official plat on which plaintiff's patent was based, and the meander line delineated on that plat, was purely arbitrary.

The intent of the United States Government is paramount; if that intent was to make the line delineated a meander and not a boundary line, it must be so held.

Official patents and surveys of the United States cannot be attacked collaterally, or in litigations between private persons. *Stoneroad* v. *Stoneroad*, 158 U. S. 240; *Russell* v. *Maxwell Land Grant Co.*, 158 U. S. 253; *Horne* v. *Smith*, 159 U. S. 40; *Whitaker* v. *McBride*, 197 U. S. 510.

Mr. David T. Watson and *Mr. Eugene Mackey* for defendant in error:

A Government patent is construed against the grantee.

The patent shows no intent to convey the land in controversy. The Bristol survey was made at the request of the patentee and was a survey of his improvements.

He and his successors never took possession of the land. The Bristol survey line was not in fact a meander line. The words "spur of marsh extend out north" exclude this land. The omission of three hundred acres to the south shows that the Bristol survey line was not a meander line.

Calling it a meander in Bristol's notes is not controlling. The Government plat is not conclusive.

Whether defendant could question plaintiff's title in a possessory action under the Louisiana practice is not a Federal question. The writ of error does not present the question of defendant in error's title under the mining laws.

Under the mining laws defendant in error's title is valid.

The alleged removal of a raft in the Red River was not proved and presents no Federal question.

In support of these contentions, see *Adkins* v. *Arnold*, 235 U. S. 417; *Barnhart* v. *Ehrhart*, 33 Oregon, 274; *Barringer* v. *Adams*, 141 Iowa, 419; *Bissell* v. *Fletcher*, 19 Nebraska, 725; *Bonis* v. *James*, 7 Rob. (La.) 149; *Buena Vista County* v. *Iowa Falls &c. Co.*, 112 U. S. 165; *Chapman* v. *Bigelow*, 206 U. S. 41; *Chapman* v. *St. Francis*, 232 U. S. 186; *Chrisman* v. *Miller*, 197 U. S. 313; *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 112 Fed. Rep. 4; *Crossman* v. *Pendery*, 8 Fed. Rep. 693; *French-Glenn Co.* v. *Springer*, 185 U. S. 47; *Fuller* v. *Shedd*, 161 Illinois, 462; *Fulton* v. *Frandolig*, 63 Texas, 330; *Glenn* v. *Jeffrey*, 75 Iowa, 20; *Graham* v. *Gill*, 223 U. S. 643; *Granger* v. *Swart*, 1 Woolw. 88; *S. C.*, Fed. Cas. No. 5685; *Grant* v. *Hemphill*, 92 Iowa, 218; *Hale* v. *Gaines*, 22 How. 144; *Hardin* v. *Jordan*, 140 U. S. 371; *James* v. *Howard*, 41 Ohio, 696; *Lamars* v. *Nissen*, 4 Nebraska, 245; *Little* v. *McPherson*, 35 Oregon, 51; *McLenemore* v. *Express Oil Co.*, 158 California, 551; *Miller* v. *Chrisman*, 140 California, 440; *Mining Co.* v. *Tunnel Co.*, 196 U. S. 337; *Mitchell* v. *Smale*, 140 U. S. 406; *Niles* v. *Cedar Point Club*, 175 U. S. 300; *Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Schlosser* v. *Hemphill*, 118 Iowa, 452; *Scott* v. *Lattig*,

227 U. S. 229; *Security Land Co.* v. *Burns*, 193 U. S. 167; *Shively* v. *Bowlby*, 152 U. S. 1; *Shoemaker* v. *Hatch*, 13 Illinois, 261; *United States* v. *Arredondo*, 6 Pet. 691; *Whitaker* v. *McBride*, 197 U. S. 510; *Wright* v. *Mattison*, 18 How. 50; *Yazoo Ry.* v. *Adams*, 180 U. S. 1.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Plaintiff in error—The Oil Company—instituted this action July 1, 1910, in the District Court, Caddo Parish, Louisiana, for the purpose of establishing its right to possession of part of Lot No. 1, Section 4, Township 20, North, Range 16, West, suddenly become very valuable through discovery of gas and oil. The petition alleges that the United States in 1874 sold to one Pitts Lots 1 and 2, Section 4, forming a projection known as "Wilson's Point," surrounded on three sides by waters of James Bayou, a navigable stream; that he immediately entered and together with his successors remained in peaceful, complete possession until April 2, 1910, when defendants in error, without knowledge of Noel, then owner, wrongfully entered upon part of Lot No. 1, built a wire fence and placed a keeper thereon; that April 15, 1910, by notarial act duly recorded, the Oil Company purchased both lots from Noel and became subrogated to his rights; and when it came to subject the whole property to actual possession a portion was found occupied as above indicated.

A writ of sequestration, issued contemporaneously with filing of petition, was subsequently dissolved upon motion, a proper bond having been given conditioned not to commit waste and to make faithful restitution of fruits if so required.

Answering, defendants in error denied they were occupying any part of Lot No. 1, Section 4, but said they were and had been since April 2, 1910, in possession of 87.9 acres situated in Sections 3 and 4, Township 20, described by metes

and bounds, "which said property your respondents located under the laws of the United States relative to the location of mining lands and upon which they have made a discovery of oil and gas, and are, therefore, entitled to the full use and enjoyment and to a patent from the United States." They also denied the Oil Company or any of "its ancestors in title ever had or claimed possession to any part of the property so located by your respondents; but, that, on the contrary, your respondents aver that the said land was never in the possession of any person until the location by them." Further answering they averred that "Thomas H. Pitts purchased from the United States, among other property, Lot One of Section Four, Township Twenty North of Range Sixteen West, containing 12.84 acres and that he paid for the same with military land warrants, as containing that acreage; that the said Lot One of Section Four is figured and described on the surveys of the United States by certain metes and bounds, shown on the said plat, the eastern boundary of said lot, as well as the other boundaries thereof, being shown on the said map; that the East line of said lot which is the boundary between the land of respondents and that of plaintiff, did not and does not denote the banks of any body of water, but that, on the contrary, the said line was run through the hills as the line of boundary of the said lot; that the land of which your respondents are in possession and which they located under their mineral filing aforesaid, is high land, not subject to overflow at any time, and which never constituted any part of any lake or bayou and which was left out of the surveys of the United States and which remained the property of the Government until said location had been made thereon by your respondent."

There were introduced in evidence patents from the Government, field notes and attending documents, official plat, sundry conveyances, contour maps—one prepared by Williams for plaintiff company, another by Barnes for

defendants,—Barbour's survey of Sections 9, 10, 15 and 16, and photographs showing landscape and vegetation. Witnesses were examined in behalf of both sides chiefly in explanation of lines, maps, water levels, character of land and growth thereon. A draft of the official plat (5/6 original size) is in the margin; on the following page is a copy of the combination map (much reduced) showing the Bristol, Williams, Barnes, and Barbour surveys especially referred to by the Louisiana Supreme Court. At the trial the following stipulation was made part of the record:

"It is admitted by both parties that J. S. Noel was in possession, as owner, from the date of his purchase in 1880 [1884], to the sale to the plaintiffs of the property known as the Wilson's Point place, his corporeal possession being limited on the East and North by the Bristol meander line, and said Noel never exercised any acts of corporeal possession, or was ever in occupancy of any land in Section Four, East of, or outside of the said meander line, or of any of the land in controversy. This is not intended to apply to any other land West of the land in controversy. That Noel's possession was vested by act of purchase and continued by occupancy in the Plaintiffs.

"It is further admitted that defendants on the second day of April, 1910, took actual possession of, and posted and filed notices of location under the placer mining laws of the United States, of the tract of land on which they are now in possession, and concerning which this suit is brought, which tract of land is described by metes and bounds in defendants' answer.

"It is further admitted that when defendants took possession of said land, they located the western boundary line of their location, as the Bristol meander line, as properly located, and the defendant does not claim the ownership or possession of any land west of the true location of said Bristol meander line.

"It is admitted that since the institution of this suit

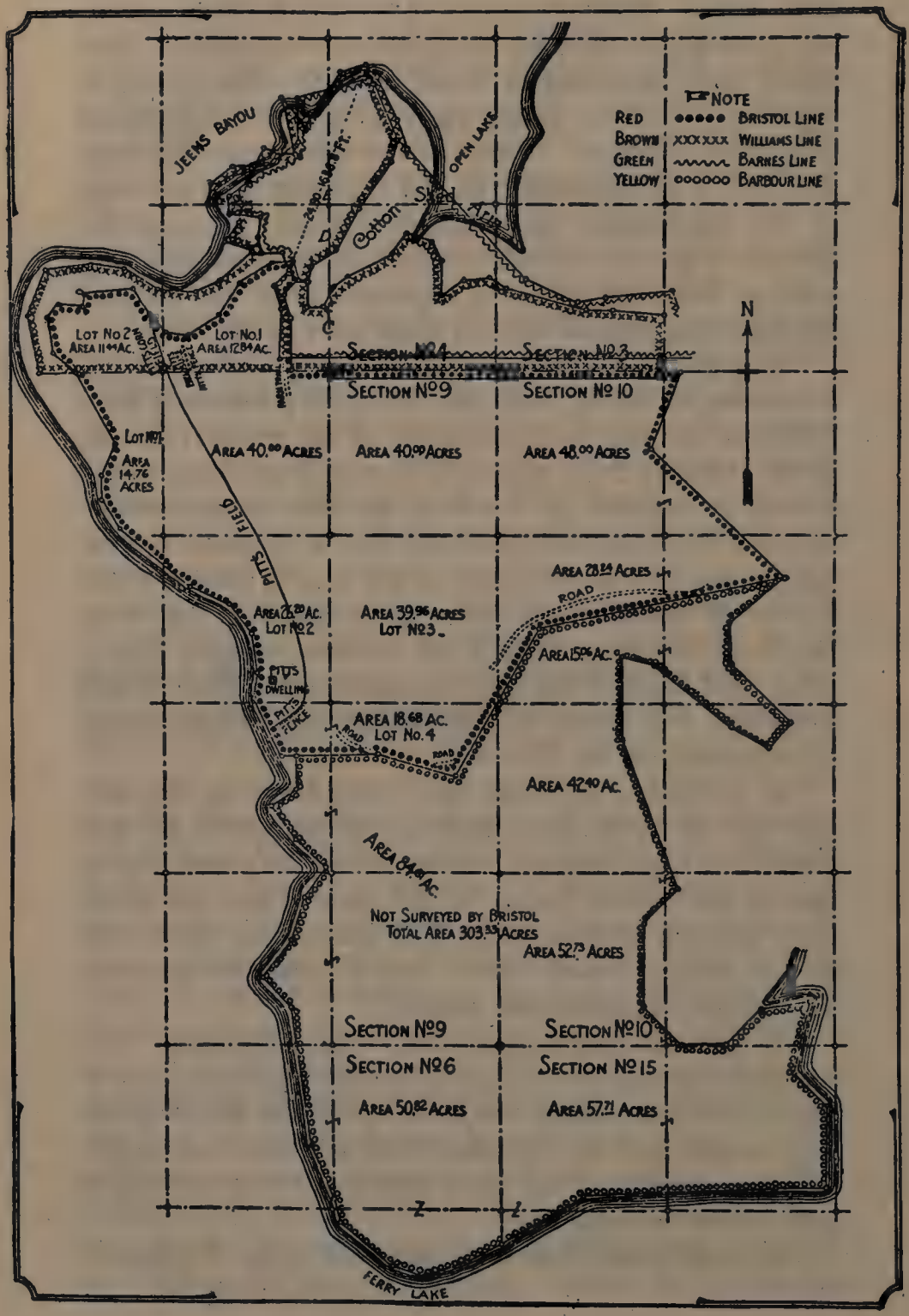

NOTE
RED ●●●●● BRISTOL LINE
BROWN XXXXXX WILLIAMS LINE
GREEN ~~~~ BARNES LINE
YELLOW ○○○○○○ BARBOUR LINE
JEEMS BAYOU
OPEN LAKE
Cotton Shed Area
N
LOT No 2 AREA 11.44 AC.
LOT No. 1 AREA 12.84 AC.
SECTION No 4
SECTION No 3
SECTION No 9
SECTION No 10
LOT No 1 AREA 14.76 ACRES
AREA 40.00 ACRES
AREA 40.00 ACRES
AREA 48.00 ACRES
PITTS FIELD
AREA 28.24 ACRES
ROAD
AREA 26.20 AC. LOT No 2
AREA 39.96 ACRES LOT No 3
AREA 15.06 AC.
PITTS DWELLING
PITTS FENCE
AREA 18.68 AC. LOT No. 4
ROAD
ROAD
AREA 42.40 AC.
AREA 84.81 AC.
NOT SURVEYED BY BRISTOL
TOTAL AREA 303.33 ACRES
AREA 52.73 ACRES
SECTION No 9
SECTION No 10
SECTION No 6
SECTION No 15
AREA 50.82 ACRES
AREA 57.71 ACRES
FERRY LAKE

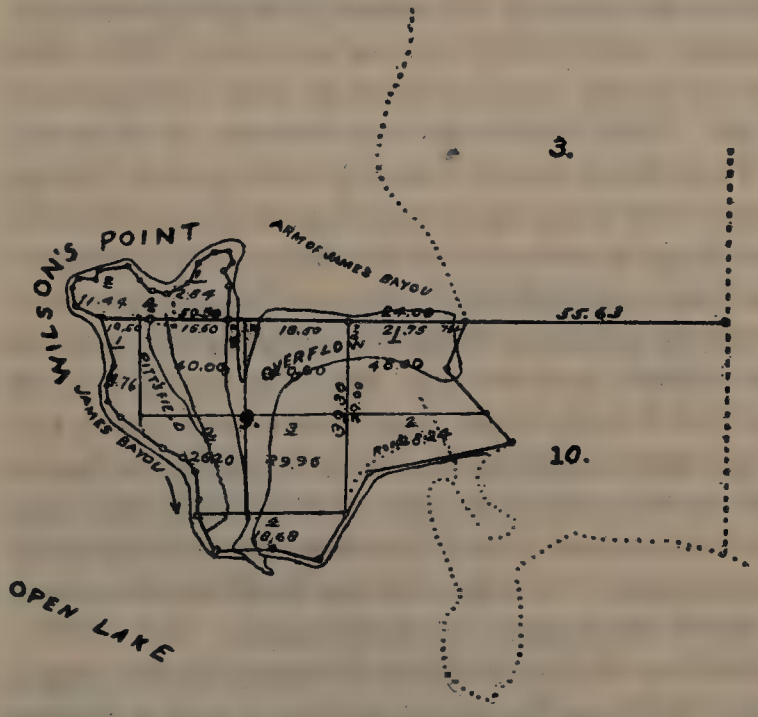
TABLE OF TRAVERSE.

In front of Sec. 4.		N. 39½ W.	3.00	S. 24° W.	4.00	S. 76° E.	10.00
N. 2° E.	6.00	N. 31½ W.	3.50	South	3.00	N. 30 E.	11.00
N. 15° W.	3.00	S. 84° W.	6.00	S. 31° E.	4.00	In front of Sec. 10	
*N. 47½ E.	3.50	S. 13° W.	1.50	S. 51 E.	11.00	30° E.	9.80
N. 16° W.	2.50	N. 83° W.	3.00	S. 65 E.	5.00	N. 78° E.	30.00
S. 86½ W.	2.50	S. 39 W.	2.00	S. 56 E.	4.00	N. 43° W.	20.00
S. 57° W.	4.50	S. 8° E.	4.50	S. 3° E.	5.00	N. 20° E.	10.00
S. 33¼ W.	4.50	S. 50° E.	3.50	S. 11° W.	3.00		
S. 63° W.	4.50	In front of Sec. 9.		S. 24¾ E.	9.00		
N. 81° W.	2.80	S. 28½ E.	10.00	N. 88½ E.	11.00		

CONTENTS:

Sec. 4.... 24.28 Acs | Sec. 9... 179.60 Acs | Sec. 10... 76.24 Acs

*See field notes N. 47½ E



the defendants have actually discovered oil and gas and are now producing oil from said property.

"It is admitted by both parties, that the land in controversy is high land and was high land at the date that Bristol made his survey in 1871.

"There being a dispute between the Plaintiff and Defendants as to the true location of the Bristol meander line referred to above, it is agreed that the said issue as to the true and exact location of said line is not to be passed upon in this case, said issue being relegated to a subsequent proceeding herein, should the Court sustain the defendants' position that said line is the true boundary between the property, and the question of costs and damages are likewise relegated to further proceedings."

Prior to 1858 Alfred Wilson squatted on the point since known by his name and during that year sold to Ann Pitts improvements upon "160 acres more or less" lying thereon. In April, 1871, Thomas H. Pitts applied to the United States for a survey of the land—long improved and then occupied—and shortly thereafter (July, 1871) this was made by Byron Bradley Bristol, duly certified and reported as "Field Notes of the Survey of Wilson's Point." From these notes, referring among other things to enclosure, corn field, fence, dwelling and road, the official plat or diagram was made in the office of the Surveyor-General of Louisiana with actual traverse lines marked out. This plat shows fractional Section 4, immediately north of Section 9—divided into two lots, No. 1 on the east, 12.84 acres, and No. 2 west, 11.44 acres—on a point upon the left bank and surrounded on three sides by waters of James Bayou. It is very small and does not indicate with certainty whether traverse lines or the stream constitute north and east boundaries. In respect of this fractional Section 4 the surveyor's field notes in part recite: "July 27th, 1871. Meanders of the left Bank of James Bayou begin at the corner between fractional sections 9 and 4 [southeast corner of Lot No. 1, Section 4], a gum tree at 24.50 West of the corner of sections 3, 4, 9 and 10; run thence down stream in fractional sec. 4; N. 2 degrees E. 6.00; N. 15 degrees W. 3.00; N. 47½ degrees E. 2.50; N. 16 degrees W. 2.50; *S. 86½ degrees W. 2.50, spur of marsh*

extends out North; S. 57 degrees W. 4.50; S. 33¼ degrees W. 4.50; S. 63 degrees W. 4.50; N. 81 degrees W. 2.80 at 1.10, enter Pitts' enclosure; N. 39½ degrees W. 3.00, enter corn field;" thence according to seven designated calls bearing westerly and southerly around Lot No. 2 "to the corner to fractional sect. 4 and 9, thence in sect. 9," etc. Under "General Description" this note appears—"The front land on James' Bayou is above the common average. The back land is thin and poor, post oak, flat. James' Bayou is navigable in ordinary seasons for large boats. The slough or water course near the original transverse in front of Sec. 10, is now dry and can only be traced by the rotten drift wood."

March 1, 1878, Thomas H. Pitts received from the United States a conveyance of "Northwest quarter of the Northeast quarter of Section Nine, . . . containing Forty Acres, according to the official plat." By patent dated February 18, 1892, which recites a soldier's warrant for 120 acres had been deposited, the United States conveyed to Thomas H. Pitts "Lots numbered one, two, three and four of Section Nine and the Lots numbered one and two of Section Four in Township Twenty North, of Range Sixteen West, of Louisiana, Meridian, in the District of Lands subject to sale at Natchitoches, Louisiana, containing One Hundred and Twenty-three acres and eighty-eight hundredths of an acre, according to the Official Plat of the Survey of said Lands returned to the General Land Office by the Surveyor-General."

Pitts' title to 163.88 acres "with all buildings and improvements," described substantially as in his two patents—one for forty acres, the other 123.88 acres—was conveyed November 23, 1880, to Walsch for $250.00; February 15, 1884, Walsch conveyed to Noel for $300.00; and on April 15, 1910, Noel conveyed the 163.88 acres "more or less" to plaintiff company for recited consideration of $50,000.

It appears that north and northeast from the northernmost traverse line of Lot No. 1 designated in field notes "S. 86½ degrees W. 2.50, spur of marsh extends out North," and between it and James Bayou, there is and was at time of Bristol survey a narrow ridge of high land 1636.8 feet long and contiguous fast ground, amounting altogether to about forty acres (87 according to defendants' estimate), upon which is much large growing timber including cypress, hickory, gum and oak—one oak 400 feet beyond the traverse lines being 14 feet in circumference. This is the land in dispute. To the south of the Bristol survey and outside its traverse lines lie 300 acres of fast land surveyed and platted by Barbour in 1896.

The Oil Company claimed traverse lines around Lot No. 1 must be treated as true meanders; that being owner and in actual possession of the lot it had constructive possession of land lying beyond such lines east and north to the Bayou—forty acres or more; and that this was being trespassed upon. Defendants in error maintained the traverse lines were not intended as true meanders; that the grant was limited by courses and distances specified; and lands north and east of these were left unsurveyed with title remaining in the Government.

The trial court sustained The Oil Company's contention and adjudged it entitled to be maintained in possession of Lot No. 1 "and that the tongue of land, on which defendants and their lessee have drilled an oil well, projecting North, and bounded North, East and West by Jeems Bayou, is a constituent and component part of Lot Number One, the boundary of said Lot Number One being the water line of Jeems Bayou; it being the purpose of this judgment to fix Jeems Bayou as the boundary of said lot without regard to any arbitrary lines of survey."

Upon appeal the Supreme Court of Louisiana (132 Louisiana, 691, 698–700, 703, 707) reversed the judgment of the trial court. It declared—"Plaintiff claims posses-

sion of the land in this suit as owner; and it produces a title from the United States government showing it to be the owner of Lot No. 1, containing 12.84 acres, and it claims the additional 40 or 87 acres, as the case may be, as a part of lot No. 1, lying between the Bristol meander line and Jeems Bayou; treating said meander line as a regular meander line, and not a boundary line. But, we cannot so consider it; particularly in view of the admission of plaintiff that: 'It is admitted by both parties, that the land in controversy is high land, and was high land at the date that Bristol made his survey in 1871.' . . . As plaintiff and its authors held no title to the land referred to it has had neither actual nor constructive possession of the same, and cannot therefore be heard to complain of the acts of these defendants. Its demand for possession must be denied. The meander line established by Bristol on the east and northeast of lot No. 1 does not meet any of the requirements set forth by the Supreme Court of the United States in defining a meander line in *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, 286. . . . Tested by this definition, which is sustained by all authorities, the so-called meander line of Bristol fails in all respects. *Niles* v. *Cedar Point Club*, 175 U. S. 300. . . . A glance at the annexed map, taken from the Williams and Barnes maps in the record, (Bristol made no map or plat, and the one made by the draftsman in the Land Office is very small and apparently without reference to a scale), shows that the Bristol meander line does not purport to define the sinuosities of a stream; it is not represented as the border line of a stream; and it shows, to a demonstration, that the meander line, as actually run on the land on the east and northeast of lot No. 1, is the boundary, and that a water course is not the boundary. . . . The evidence in the record in this case, aside from the admissions of record, shows that there was and is a large quantity of swamp or marsh land on the east and north of the Bristol

meander line. . . . If the eastern and northern boundaries of lot No. 1 were taken out and other boundaries substituted, so as to reach Jeems Bayou, plaintiff would get three to seven fold more land than was actually mentioned and described in the patent conveying this lot, or than its ancestor in title supposed he was purchasing, or than he actually paid for."

The cause is here by writ of error and the Oil Company maintains that it was obligatory upon the Supreme Court to accept the Government survey, plat and patent as correct; to treat traverses about Lot No. 1 as true meanders of the Bayou; and to hold, in consequence, that boundaries of the grant extended to the stream and include the *locus in quo*. The substantial Federal question presented—the only one for our determination—is whether properly construed the original patent conveyed to Pitts land lying between platted traverse lines and waters of the navigable stream. *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 97. The effect of riparian rights, if established, would depend upon the local law. *Hardin* v. *Shedd*, 190 U. S. 508, 519; *Whitaker* v. *McBride*, 197 U. S. 510, 512.

Many causes decided by this court involved construction of patents conveying public lands by reference to official surveys and plats indicating streams or other waters. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, 286; *Cragin* v. *Powell*, 128 U. S. 691, 696; *Hardin* v. *Jordan*, 140 U. S. 371, 380; *Mitchell* v. *Smale*, 140 U. S. 406, 412; *Horne* v. *Smith*, 159 U. S. 40, 42; *Grand Rapids &c. R. R.* v. *Butler*, 159 U. S. 87, 92; *Ainsa* v. *United States*, 161 U. S. 208, 229; *Niles* v. *Cedar Point Club*, 175 U. S. 300, 306; *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47, 51; *Kirwan* v. *Murphy*, 189 U. S. 35; *Hardin* v. *Shedd, supra; Security Land &c. Co.* v. *Burns*, 193 U. S. 167; *Whitaker* v. *McBride, supra; Graham* v. *Gill*, 223 U. S. 643, 645; *Scott* v. *Lattig*, 227 U. S. 229, 244;

Chapman v. *St. Francis*, 232 U. S. 186, 196; *Gauthier* v. *Morrison*, 232 U. S. 452, 459; *Forsyth* v. *Smale*, 7 Biss. 201 (9 Fed. Cas. No. 4950, p. 471). A review and analysis of these cases would be tedious and unprofitable; thorough acquaintance with the varying and controlling facts is essential to a fair understanding of them. They unquestionably support the familiar rule relied on by counsel for the Oil Company that in general meanders are not to be treated as boundaries and when the United States conveys a tract of land by patent referring to an official plat which shows the same bordering on a navigable river the purchaser takes title up to the water line. But they no less certainly establish the principle that facts and circumstances may be examined and if they affirmatively disclose an intention to limit the grant to actual traverse lines these must be treated as definite boundaries. It does not necessarily follow from the presence of meanders that a fractional section borders a body of water and that a patent thereto confers riparian rights.

In the instant case we find a survey of improved lands made at the express request of the occupant to whom they were subsequently patented; a grant from the United States specifying the exact number of acres conveyed; a positive declaration in field notes that land to the north lies outside the traverse lines; admission that excluded area contains not less than 40 acres of high ground, and evidence of large timber growing there; official plat delineating the surveyor's courses and specifying acreage of the several subdivisions, which cannot be said to indicate a water boundary beyond possible question. Outside the southern traverses of this plat, in space designated "Open Lake," lie 300 acres of fast land surveyed by Barbour in 1896. Although Noel, the Oil Company's immediate vendor, as owner, was in possession of property known as Wilson's Point place for some thirty years, and until after alleged unlawful entry by

defendants in error, his corporeal possession (as expressly stipulated) was limited east and north by the Bristol traverse lines and he never occupied or exercised any act of corporeal possession over the above-indicated forty acres or more without the same.

Considering all disclosures of the record we are unable to conclude the court below erred in holding original patent from the United States to Pitts conveyed no title to lands in controversy, and its judgment must be affirmed.

It seems proper to add that nothing in this opinion or the judgment to be entered thereon shall be taken to prejudice or impair any right which the United States may have in respect to the lands in controversy.

Affirmed.

GREAT NORTHERN RAILWAY COMPANY *v.* STATE OF MINNESOTA EX REL. STATE RAILROAD & WAREHOUSE COMMISSION.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 225. Argued April 16, 1915.—Decided June 14, 1915.

An order of a state railroad commission requiring a railroad company to install and maintain scales amounts to a taking of the company's property; and, if the order is arbitrary or unreasonable, the taking is without due process of law and in violation of the Fourteenth Amendment.

The facts established must be adequate as a matter of law to support a finding of requisite public necessity in justifying an order of a state railroad commission to require a railroad company to expend money —the mere declaration of the commission is not conclusive.

The business of a railroad is transportation and to supply the public

with conveniences not connected therewith is no part of its ordinary duty.

Even though the state railroad commission may have power conferred by statute to require railroad companies to supply necessary demands of the public along their transportation lines, the Commission may only require them to supply such demands as are within the duty of a railroad company.

Where facilities afforded by a railroad company are at certain of its stations outside of its actual duty to supply but produce discrimination, the railroad commission of the State may not absolutely require it to supply such facilities at every station in order to inhibit discrimination; it must give the company the opportunity of discontinuing furnishing the facilities where supplied and thus to avoid discrimination in that manner if it sees fit so to do.

Possessions of a railroad company are subject to its public duty but beyond this and within charter limits, like other owners of private property, the company may control its own affairs.

An order of the Minnesota State Railroad Commission requiring a railroad company to install weighing scales at a station similar to those installed at some of its stations in order to abate discrimination held arbitrary and unreasonable as it did not give the company the alternative right of discontinuing the scales at those stations where they were installed and abating the discrimination in that manner, as the scales while conveniences of the public had no direct part in transportation.

122 Minnesota, 55, reversed.

THE facts, which involve the power of a State Railroad Commission to require a carrier to erect weighing scales at stations, and the validity of an order of the Minnesota Railroad and Warehouse Commission, are stated in the opinion.

Mr. E. C. Lindley and *Mr. Sanford H. E. Freund* for plaintiff in error:

The order of the Commission requiring the railway company to install the scales in question for the convenience of stockmen and farmers in connection with private transactions deprives the railway company of its property without due process of law.

Conceding for the sake of argument the authority of the State to exact of the railway company non-discriminatory service, the order in question contravenes the Fourteenth Amendment to the Constitution in that it does not give the railway company the alternative of removing the alleged discrimination against Bertha by withdrawing from the stockmen at Eagle Bend and Hewitt the privilege of the use of stock scales in the transaction of their private business.

In support of these contentions, see *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279; *Mo. Pac. Ry.* v. *Nebraska*, 164 U. S. 403; *Mo. Pacific Ry.* v. *Nebraska*, 217 U. S. 196; *New Mexico Wool Growers* v. *Atchison, Topeka & Santa Fe Ry.*, 145 Pac. Rep. 1077; *Pennsylvania Co.* v. *United States*, 236 U. S. 351; *Oregon R. R. & Nav. Co.* v. *Fairchild*, 224 U. S. 409.

Mr. Lyndon A. Smith, Attorney General of the State of Minnesota, with whom *Mr. Alonzo J. Edgerton*, Assistant Attorney General of the State of Minnesota, was on the brief, for defendant in error:

Stock scales are railroad facilities, and therefore the State Railway Commission has authority to order in stock scales.

Authority of Commission should be so interpreted as to sustain its action.

Discrimination existed before and without this order.

Confiscation is never due to ordering devices useful in railroad work.

In support of these contentions see *Atl. Coast Line* v. *Nor. Car. Corp. Comm.*, 206 U. S. 1; *Ayers* v. *Chicago & N. W. Ry.*, 71 Wisconsin, 372; *Chic., R. I. & Pac. Ry.* v. *Nebraska*, 85 Nebraska, 818; *Corporation Comm.* v. *Railroad*, 139 N. Car. 133; *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128; *Farwell Warehouse* v. *Minn., St. P. & S. Ste. M. Ry.*, 55 Minnesota, 13; *Gladson* v. *G. Nor. Ry.*, 166 U. S. 127;

Minn. & St. P. R. R. v. *Minnesota*, 193 U. S. 53; *Mo. Pac. Ry.* v. *Nebraska*, 164 U. S. 403; *Minnesota* v. *Minn. & St. L. R. R.*, 76 Minnesota, 469; *New Mexico Wool Growers* v. *Atchison, T. & S. F. Ry.*, 145 Pac. Rep. 1077; *Railroad Comm.* v. *G. Nor. Ry.*, 124 Minnesota, 533; *Riddle* v. *New York, L. E. & W. Ry.*, 1 I. C. C. 787; *Minnesota* v. *G. Nor. Ry.*, 123 Minnesota, 463; *Minnesota* v. *Nor. Pac. Ry.*, 90 Minnesota, 227; *Washington* v. *Fairchild*, 224 U. S. 510; *Wisconsin &c. R. R.* v. *Jacobson*, 179 U. S. 287.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

An order of the Minnesota Railroad & Warehouse Commission (October 26, 1911) directing the Great Northern Railway Company to erect within forty-five days at least a six-ton scale in its stockyard at the village Bertha, Todd County, was sustained by the Supreme Court of the State (122 Minnesota, 55, 57–58); the cause is here by writ of error; and it is contended that enforcement of order, as promulgated, would deprive the Railway of its property without due process of law contrary to the inhibition of the Fourteenth Amendment. The Supreme Court said:

"At the trial the appellant offered no evidence but rested upon the evidence presented by the respondent and the facts are undisputed. They are in substance as follows: That in the year 1910 stock was shipped in carload lots from 259 of appellant's stations in the State of Minnesota; that the number of carloads so shipped from the different stations varied from one at each of 32 stations to 414 at the station of Jasper; that appellant has installed stock scales, each of six ton capacity, at 54 of these stations; that these scales are located adjacent to the stockyards, but are not adjacent to nor connected with the railway track or buildings; that they are convenient for and are

used by dealers and stock raisers in buying and selling, but no obligation to ship over the railway is imposed by such use; that stock raisers who would otherwise market their stock at Bertha sometimes take it to Hewitt or Eagle Bend, a longer distance, in order to have the use of the scales installed at those places; that such scales tend to draw the stock business to and concentrate it at the places where they are located; that where these scales are available shippers are accustomed to weigh their stock, for their own convenience and information, immediately before loading for shipment, but these weights are not used as a basis for freight charges, nor in any transactions between the shipper and the railway company, nor in sales made at the terminal stockyards; that, after stock is loaded, the carload is weighed at some suitable point upon track scales which are under the supervision of the State, and the freight charges and all the transactions between the shipper and the company are based exclusively upon this weight; and that these stock scales are not used in any manner in the business transacted between the railway company and its patrons.

"The witnesses testifying for respondent insisted that stock scales were a convenience, if not a necessity, in dealing in stock, and that a town having such scales possessed an advantage, as a stock market, over a town that did not, but frankly admitted that these scales had no direct part in the business of transportation, nor in the business of selling at the terminal yards.

"As scales are a convenience and, probably, a necessity in dealing in stock, and tend to cause stock to be collected for shipment at the places where they are available, to the disadvantage of those places where they are not available, and are undoubtedly furnished for the purpose and with the view of securing the transportation of stock from points at which they are located, it is the opinion of a majority of the members of the court that the evidence

submitted, together with the fact that the company considered such scales of sufficient importance to its business to furnish them voluntarily at 54 of its stockyards in this State, is sufficient to support the finding that such scales pertain to the transportation facilities which the commission may require of a railroad and that the refusal to supply such scales to the station in question was a discrimination against it."

Manifestly, if the order is enforced plaintiff in error's property will be taken. Whether this would be without due process of law depends upon the special circumstances.

The applicable principles were announced in *Oregon Railroad &c. Co.* v. *Fairchild*, 224 U. S. 510, 524. A taking of railroad property under administrative regulation must "be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet." The facts being established the question then presented is whether as matter of law they are adequate to support a finding of requisite public necessity—the mere declaration of a commission is not conclusive. *Interstate Commerce Commission* v. *Louis. & Nash. Railroad*, 227 U. S. 88, 91; *Florida East Coast Line* v. *United States*, 234 U. S. 167, 185.

It appears from the Supreme Court's findings that six-ton scales installed by the Railway at 54 of its 259 stock-shipping stations in Minnesota were not used in transactions between carrier and shippers. All witnesses declared these instruments had no direct part in transportation or selling at terminal yards but were convenient in stock dealings and a station possessing one had an advantage over the place where none existed.

The business of a railroad is transportation and to supply the public with conveniences not connected therewith is no part of its ordinary duty. The obvious purpose of the challenged order was to enforce installation at Bertha

of a scale like those at Eagle Bend and Hewitt and dedicated to same use. Under admitted facts, unless justified by alleged unlawful discrimination, we think this was an arbitrary and unreasonable exercise of power. It is no answer to say, as counsel do, that the Commission has "general authority to require railroad companies to supply the necessary demands of the public along transportation lines; that it has a right to require the company to build and maintain such facilities as are necessary for the public needs." The demands upon a carrier which lawfully may be made are limited by its duty, and the present record conclusively shows the required structure had no direct relation thereto. See *New Mexico Wool Growers' Association* v. *Atchison, Topeka & Santa Fe Ry.*, 145 Pac. Rep. 1077.

The Railway Company does not presently controvert the finding that scales at Eagle Bend and Hewitt brought about discrimination, but maintains the Commission acted arbitrarily and unreasonably in seeking to eliminate this by peremptorily requiring construction of another without giving opportunity to accomplish the same result through discontinuing the use of those already installed. This contention is sound and must be sustained. Conceding power to inhibit discrimination the Commission could not exercise it unreasonably by needlessly taking property or, what comes to the same thing, obliging incurrence of expense wholly unnecessary. It by no means follows, simply because a railroad voluntarily supplies a convenience at some stations which attracts trade, that it can be commanded positively to do likewise at other places along the line. A railroad's possessions are subject to its public duty but beyond this and within charter limits, like other owners of private property, it may control its own affairs. Discontinuing the use of existing scales would abate the alleged discrimination and probably entail little, if any, outlay. The Commission's order pre-

cluded use of this method to bring about lawful conditions and therein, we think, was plainly arbitrary and unreasonable. *Missouri Pacific Railway* v. *Nebraska*, 164 U. S. 403, 417; *Donovan* v. *Pennsylvania Company*, 199 U. S. 279, 293; *Missouri Pacific Railway* v. *Nebraska*, 217 U. S. 196, 206.

The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

GUINN AND BEAL *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 96. Argued October 17, 1913.—Decided June 21, 1915.

The so-called Grandfather Clause of the amendment to the constitution of Oklahoma of 1910 is void because it violates the Fifteenth Amendment to the Constitution of the United States.

The Grandfather Clause being unconstitutional and not being separable from the remainder of the amendment to the constitution of Oklahoma of 1910, that amendment as a whole is invalid.

The Fifteenth Amendment does not, in a general sense, take from the States the power over suffrage possessed by the States from the beginning, but it does restrict the power of the United States or the States to abridge or deny the right of a citizen of the United States to vote on account of race, color or previous condition of servitude.

While the Fifteenth Amendment gives no right of suffrage, in its command is self-executing, rights of suffrage may be enjoyed by reason of the striking out of discriminations against the exercise of the right.

A provision in a state constitution recurring to conditions existing before the adoption of the Fifteenth Amendment and the continuance of which conditions that amendment prohibited, and making those

conditions the test of the right to the suffrage is in conflict with, and void under, the Fifteenth Amendment.

The establishment of a literacy test for exercising the suffrage is an exercise by the State of a lawful power vested in it not subject to the supervision of the Federal courts.

Whether a provision in a suffrage statute may be valid under the Federal Constitution, if it is so connected with other provisions that are invalid, as to make the whole statute unconstitutional, is a question of state law, but in the absence of any decision by the state court, this court may, in a case coming from the Federal courts, determine it for itself.

The suffrage and literacy tests in the amendment of 1910 to the constitution of Oklahoma are so connected with each other that the unconstitutionality of the former renders the whole amendment invalid.

THE facts, which involve the constitutionality under the Fifteenth Amendment of the Constitution of the United States of the suffrage amendment to the constitution of Oklahoma, known as the Grandfather Clause, and the responsibility of election officers under § 5508, Rev. Stat., and § 19 of the Penal Code for preventing people from voting who have the right to vote, are stated in the opinion.

Mr. Joseph W. Bailey, with whom *Mr. C. B. Stuart*, *Mr. A. C. Cruce*, *Mr. W. A. Ledbetter*, *Mr. Norman Haskell* and *Mr. C. G. Hornor* were on the brief, for plaintiffs in error:

Determination of the constitutionality of the Grandfather Clause in the Oklahoma constitution, not being necessary to a full solution of this case, this court will not pass upon the constitutionality of such provision. *Atwater* v. *Hassett*, 111 Pac. Rep. 802; Bishop on Stat. Crime, §§ 805–806; *Braxton County* v. *West Virginia*, 208 U. S. 192; *Burns* v. *State*, 12 Wisconsin, 519; *Devard* v. *Hoffman*, 18 Maryland, 479; *Liverpool Co.* v. *Immigration Commissioners*, 113 U. S. 39; *Mo., Kans. & Tex. Ry.* v. *Ferris*, 179 U. S. 606; §§ 19, 20, Penal Code; § 5508,

Rev. Stats. (§ 19, Penal Code); *Smith* v. *Indiana*, 191 U. S. 139; *Cruce* v. *Cease*, 114 Pac. Rep. 251; *New Orleans Canal Co.* v. *Heard*, 47 La. Ann. 1679.

As to the nature of suffrage, see Jameson on Const. Conventions, § 336.

Suffrage in the States of the American Union is not controlled or affected by the Fourteenth Amendment to the Constitution of the United States. Blaine's Twenty Years in Congress; Brannon's Fourteenth Amendment, 77; *Coffield* v. *Coryell*, 4 Wash. C. C. 371; Miller's Lectures on Const., 661; *Minor* v. *Happersett*, 21 Wall. 162; *Slaughter House Cases*, 16 Wall. 36; *Strauder* v. *West Virginia*, 100 U. S. 303; 1 Willoughby's Constitution, 534; 2 *Id.* 483; 5 Woodrow Wilson's Hist. Am. People.

The Grandfather Clause does not violate the Fifteenth Amendment to the Constitution of the United States. *Atwater* v. *Hassett*, 111 Pac. Rep. 802; *Dred Scott Case*, 19 How. 393; *Dodge* v. *Woolsey*, 18 How. 371; *Fairbanks* v. *United States*, 181 U. S. 286; *Fletcher* v. *Peck*, 6 Cranch, 87; *Mills* v. *Green*, 67 Fed. Rep. 818; *Mills* v. *Green*, 69 Fed. Rep. 852; *Mitchell* v. *Lippencott*, 2 Woods, 372; *McClure* v. *Owen*, 26 Iowa, 253; *McCreary* v. *United States*, 195 U. S. 27; *Pope* v. *Williams*, 193 U. S. 621; *Southern R. R.* v. *Orton*, 6 Sawyer, 32 Fed. Rep. 478; *State* v. *Grand Trunk R. R.*, 3 Fed. Rep. 889; Stimson's Fed. & State Const. 224; *United States* v. *Reece*, 92 U. S. 214; *United States* v. *Cruickshank*, 92 U. S. 542; *United States* v. *Anthony*, 11 Blatchf. 205; *United States* v. *Des Moines*, 142 U. S. 545; *Webster* v. *Cooper*, 14 How. 488; *Williams* v. *Mississippi*, 170 U. S. 214; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

Even though the exemption privilege provided in the Grandfather Law may be invalid, yet, the body of the law may be permitted to stand. *Albany* v. *Stanley*, 105 U. S. 305; *Trade Mark Cases*, 100 U. S. 82; *Little Rock &c. Ry.* v. *Worthen*, 120 U. S. 97.

The exception does not deny or abridge the right to vote on account of race, color, or previous condition of servitude.

The purpose and motive which moved the legislature to submit and the people to adopt the amendment are not subject to judicial inquiry.

The exception which is challenged as vitiating the entire amendment, even if open to judicial inquiry, is valid, because it applies without distinction of race, color, or previous condition of servitude.

In support of these contentions, see *Bailey* v. *Alabama*, 219 U. S. 219; *Cruce* v. *Cease*, 28 Oklahoma, 271; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *McCray* v. *United States*, 195 U. S. 27; *Ratcliffe* v. *Beal*, 20 So. Rep. 865; *Smith* v. *Indiana*, 191 U. S. 138; *Soon Hing* v. *Crowley*, 113 U. S. 703; *United States* v. *Reese*, 92 U. S. 214; *Williams* v. *Mississippi*, 170 U. S. 213; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

Mr. Solicitor General Davis for the United States:

The questions propounded by the Circuit Court of Appeals are raised by the facts as certified and are indispensable to a determination of the cause.

The answer to the second question propounded by the court, is that the Grandfather Clause of the amendment to the constitution of Oklahoma of the year 1910 is void because it violates the Fifteenth Amendment.

The so-called Grandfather Clause incorporates by reference the laws of those States which in terms excluded negroes from the franchise on January 1, 1866, because of race, color, or condition of servitude, and so itself impliedly excludes them for the same reason.

The doctrine of incorporation by reference has been frequently enunciated and applied. *Bank for Savings* v. *Collector*, 3 Wall. 495; *Donnelly* v. *United States*, 228 U. S. 243; *Ex parte Crow Dog*, 109 U. S. 556; *In re Heath*,

144 U. S. 92; *In re Hohorst*, 150 U. S. 653; *United States* v. *Le Bris*, 121 U. S. 278; *Viterbo* v. *Friedlander*, 120 U. S. 707. See also: Endlich, Interp. Stats., § 492; Potter's Dwarris, pp. 190–192, 218; Sutherland, Statutes, 2d ed., § 405.

What is implied in a statute is as much a part of it as what is expressed. *Gelpcke* v. *Dubuque*, 1 Wall. 175, 220; *United States* v. *Babbit*, 1 Black, 55, 61; *Wilson County* v. *Third Nat. Bank*, 103 U. S. 770, 778.

Whether at a given time a man was entitled to vote is a mixed question of law and fact, to be resolved only by consulting the law fixing the qualifications for suffrage and then the facts as to his possession of those qualifications.

While the Fifteenth Amendment did not confer the right of suffrage upon anyone, it did confer upon citizens of the United States from and after the date of its ratification the right not to be discriminated against in the exercise of the elective franchise on account of race, color, or previous condition of servitude. *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Cruikshank*, 92 U. S. 542.

In all cases where the former slave-holding States had not removed from their constitutions the word "white" as a qualification for voting, the Fifteenth Amendment did in effect confer upon the negro the right to vote, because, being paramount to the state law, it annulled the discriminating word "white" and thus left him in the enjoyment of the same right as white persons. *Ex parte Yarbrough*, 110 U. S. 651; *Neal* v. *Delaware*, 103 U. S. 370.

If, therefore, the date fixed in the Grandfather Clause had been the year 1871—after the adoption of the Fifteenth Amendment—instead of the year 1866, the constitutions and laws to which it referred, and which were by such reference made a part of it, would have been already purged of the vice of racial discrimination, and

the amendment itself would have been likewise free from it. To reflect upon the change which would be wrought in the meaning of this Grandfather Clause by the substitution of the year 1871 for the year 1866 is to be confirmed in the conviction of its utter invalidity.

The necessary effect and operation of the Grandfather Clause is to exclude practically all illiterate negroes and practically no illiterate white men, and from this its unconstitutional purpose may legitimately be inferred.

The census statistics show that the proportion of negroes qualified under the test imposed by the Grandfather Clause is as inconsiderable as the proportion of whites thereby disqualified.

In practical operation the amendment inevitably discriminates between the class of illiterate whites and illiterate blacks as a class, to the overwhelming disadvantage of the latter.

The necessary effect and operation of a state statute or constitutional amendment may be considered in determining its validity under the Federal Constitution. *Bailey* v. *Alabama*, 219 U. S. 219; *Ho Ah Kow* v. *Nunan*, 5 Sawyer, 552; *Home Insurance Co.* v. *New York*, 134 U. S. 594, 598; *Yick Wo* v. *Hopkins*, 118 U. S. 356. See also: *Brimmer* v. *Rebman*, 138 U. S. 78, 82; *Chy Lung* v. *Freeman*, 92 U. S. 275, 278; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 240; *Henderson* v. *Mayor of N. Y.*, 92 U. S. 259, 268; *Lochner* v. *New York*, 198 U. S. 45, 64; *McCray* v. *United States*, 195 U. S. 27, 60. See also: *Maxwell* v. *Dow*, 176 U. S. 581; *Minnesota* v. *Barber*, 136 U. S. 313, 319; *Missouri* v. *Lewis*, 101 U. S. 22, 32; *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 63. Distinguishing—*Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; and *Williams* v. *Mississippi*, 170 U. S. 213.

The answer to the first question propounded by the court is that the Grandfather Clause being in violation of the Fifteenth Amendment and void, the amendment of 1910

to the constitution of Oklahoma as a whole is likewise invalid. The unconstitutional portion of the amendment is not separable from the remainder. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 564–565; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 395.

The first question certified by the Circuit Court of Appeals should be answered in the negative; the second question in the affirmative.

Mr. Moorfield Storey for the National Association for the Advancement of Colored People:

All discriminations respecting the right to vote on account of color are unconstitutional.

Whether the Oklahoma amendment constitutes such a discrimination is to be determined by its purpose and effect, and not by its phraseology alone.

The undoubted purpose and effect of the amendment is to discriminate against colored voters. *Anderson* v. *Myers*, 182 Fed. Rep. 223; *Bailey* v. *Alabama*, 219 U. S. 219; *Brimmer* v. *Rebman*, 138 U. S. 78; *Collins* v. *New Hampshire*, 171 U. S. 30; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Galveston &c. Ry.* v. *Texas*, 210 U. S. 217; *Giles* v. *Harris*, 189 U. S. 475; *Giles* v. *Teasley*, 193 U. S. 146; *Graver* v. *Faurot*, 162 U. S. 435; *Hannibal & St. Jo. R. R.* v. *Husen*, 95 U. S. 465; *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Lochner* v. *New York*, 198 U. S. 45; *Maynard* v. *Hecht*, 151 U. S. 324; *Minnesota* v. *Barber*, 136 U. S. 313; *Mobile* v. *Watson*, 116 U. S. 289; *New Hampshire* v. *Louisiana*, 108 U. S. 76; *People* v. *Albertson*, 55 N. Y. 50; *People* v. *Compagnie Générale*, 107 U. S. 59; *Postal Tel.-Cable* v. *Taylor*, 192 U. S. 64; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Scott* v. *Donald*, 165 U. S. 58; *Smith* v. *St. Louis & So. W. Ry.*, 181 U. S. 248; *State* v. *Jones*, 66 Ohio St. 453; *Strauder* v. *West Virginia*, 100 U. S. 303; *Voight* v. *Wright*, 141 U. S. 62; *Williams* v. *Mississippi*, 170 U. S. 213; *Ex parte Yarbrough*, 110 U. S. 651.

Mr. J. H. Adriaans filed a brief as *amicus curiæ.*

Mr. John H. Burford and *Mr. John Embry* filed a brief as *amici curiæ.*

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case is before us on a certificate drawn by the court below as the basis of two questions which are submitted for our solution in order to enable the court correctly to decide issues in a case which it has under consideration. Those issues arose from an indictment and conviction of certain election officers of the State of Oklahoma (the plaintiffs in error) of the crime of having conspired unlawfully, wilfully and fraudulently to deprive certain negro citizens, on account of their race and color, of a right to vote at a general election held in that State in 1910, they being entitled to vote under the state law and which right was secured to them by the Fifteenth Amendment to the Constitution of the United States. The prosecution was directly concerned with § 5508, Rev. Stat., now § 19 of the Penal Code which is as follows:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

We concentrate and state from the certificate only matters which we deem essential to dispose of the questions asked.

Suffrage in Oklahoma was regulated by § 1, Article III of the Constitution under which the State was admitted into the Union. Shortly after the admission there was submitted an amendment to the Constitution making a radical change in that article which was adopted prior to November 8, 1910. At an election for members of Congress which followed the adoption of this Amendment certain election officers in enforcing its provisions refused to allow certain negro citizens to vote who were clearly entitled to vote under the provision of the Constitution under which the State was admitted, that is, before the amendment, and who, it is equally clear, were not entitled to vote under the provision of the suffrage amendment if that amendment governed. The persons so excluded based their claim of right to vote upon the original Constitution and upon the assertion that the suffrage amendment was void because in conflict with the prohibitions of the Fifteenth Amendment and therefore afforded no basis for denying them the right guaranteed and protected by that Amendment. And upon the assumption that this claim was justified and that the election officers had violated the Fifteenth Amendment in denying the right to vote, this prosecution, as we have said, was commenced. At the trial the court instructed that by the Fifteenth Amendment the States were prohibited from discriminating as to suffrage because of race, color, or previous condition of servitude and that Congress in pursuance of the authority which was conferred upon it by the very terms of the Amendment to enforce its provisions had enacted the following (Rev. Stat., § 2004):

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people of any State, Territory, district, . . . municipality, . . . or

other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

It then instructed as follows:

"The State amendment which imposes the test of reading and writing any section of the State constitution as a condition to voting to persons not on or prior to January 1, 1866, entitled to vote under some form of government, or then resident in some foreign nation, or a lineal descendant of such person, is not valid, but you may consider it in so far as it was in good faith relied and acted upon by the defendants in ascertaining their intent and motive. If you believe from the evidence that the defendants formed a common design and coöperated in denying the colored voters of Union Township precinct, or any of them, entitled to vote, the privilege of voting, but this was due to a mistaken belief sincerely entertained by the defendants as to the qualifications of the voters—that is, if the motive actuating the defendants was honest, and they simply erred in the conception of their duty—then the criminal intent requisite to their guilt is wanting and they cannot be convicted. On the other hand, if they knew or believed these colored persons were entitled to vote, and their purpose was to unfairly and fraudulently deny the right of suffrage to them, or any of them entitled thereto, on account of their race and color, then their purpose was a corrupt one, and they cannot be shielded by their official positions."

The questions which the court below asks are these:

"1. Was the amendment to the constitution of Oklahoma, heretofore set forth, valid?

"2. Was that amendment void in so far as it attempted to debar from the right or privilege of voting for a qualified

candidate for a Member of Congress in Oklahoma, unless they were able to read and write any section of the constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a Member of Congress in that State, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?"

As these questions obviously relate to the provisions concerning suffrage in the original constitution and the amendment to those provisions which forms the basis of the controversy, we state the text of both. The original clause so far as material was this:

"The qualified electors of the State shall be male citizens of the United States, male citizens of the State, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the State one year, in the county six months, and in the election precinct thirty days, next preceding the election at which any such elector offers to vote."

And this is the amendment:

"No person shall be registered as an elector of this State or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma; but no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the

precinct election officer when electors apply for ballots to vote."

Considering the questions in the light of the text of the suffrage amendment it is apparent that they are twofold because of the twofold character of the provisions as to suffrage which the amendment contains. The first question is concerned with that provision of the amendment which fixes a standard by which the right to vote is given upon conditions existing on January 1, 1866, and relieves those coming within that standard from the standard based on a literacy test which is established by the other provision of the amendment. The second question asks as to the validity of the literacy test and how far, if intrinsically valid, it would continue to exist and be operative in the event the standard based upon January 1, 1866, should be held to be illegal as violative of the Fifteenth Amendment.

To avoid that which is unnecessary let us at once consider and sift the propositions of the United States on the one hand and of the plaintiffs in error on the other, in order to reach with precision the real and final question to be considered. The United States insists that the provision of the amendment which fixes a standard based upon January 1, 1866, is repugnant to the prohibitions of the Fifteenth Amendment because in substance and effect that provision, if not an express, is certainly an open repudiation of the Fifteenth Amendment and hence the provision in question was stricken with nullity in its inception by the self-operative force of the Amendment, and as the result of the same power was at all subsequent times devoid of any vitality whatever.

For the plaintiffs in error on the other hand it is said the States have the power to fix standards for suffrage and that power was not taken away by the Fifteenth Amendment but only limited to the extent of the prohibitions which that Amendment established. This being true, as the

standard fixed does not in terms make any discrimination on account of race, color, or previous condition of servitude, since all, whether negro or white, who come within its requirements enjoy the privilege of voting, there is no ground upon which to rest the contention that the provision violates the Fifteenth Amendment. This, it is insisted, must be the case unless it is intended to expressly deny the State's right to provide a standard for suffrage, or what is equivalent thereto, to assert: *a*, that the judgment of the State exercised in the exertion of that power is subject to Federal judicial review or supervision, or *b*, that it may be questioned and be brought within the prohibitions of the Amendment by attributing to the legislative authority an occult motive to violate the Amendment or by assuming that an exercise of the otherwise lawful power may be invalidated because of conclusions concerning its operation in practical execution and resulting discrimination arising therefrom, albeit such discrimination was not expressed in the standard fixed or fairly to be implied but simply arose from inequalities naturally inhering in those who must come within the standard in order to enjoy the right to vote.

On the other hand the United States denies the relevancy of these contentions. It says state power to provide for suffrage is not disputed, although, of course, the authority of the Fifteenth Amendment and the limit on that power which it imposes is insisted upon. Hence, no assertion denying the right of a State to exert judgment and discretion in fixing the qualification of suffrage is advanced and no right to question the motive of the State in establishing a standard as to such subjects under such circumstances or to review or supervise the same is relied upon and no power to destroy an otherwise valid exertion of authority upon the mere ultimate operation of the power exercised is asserted. And applying these principles to the very case in hand the argument of the

Government in substance says: No question is raised by the Government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of state judgment and therefore cannot be here assailed either by disregarding the State's power to judge on the subject or by testing its motive in enacting the provision. The real question involved, so the argument of the Government insists, is the repugnancy of the standard which the amendment makes, based upon the conditions existing on January 1, 1866, because on its face and inherently considering the substance of things, that standard is a mere denial of the restrictions imposed by the prohibitions of the Fifteenth Amendment and by necessary result re-creates and perpetuates the very conditions which the Amendment was intended to destroy. From this it is urged that no legitimate discretion could have entered into the fixing of such standard which involved only the determination to directly set at naught or by indirection avoid the commands of the Amendment. And it is insisted that nothing contrary to these propositions is involved in the contention of the Government that if the standard which the suffrage amendment fixes based upon the conditions existing on January 1, 1866, be found to be void for the reasons urged, the other and literacy test is also void, since that contention rests, not upon any assertion on the part of the Government of any abstract repugnancy of the literacy test to the prohibitions of the Fifteenth Amendment, but upon the relation between that test and the other as formulated in the suffrage amendment and the inevitable result which it is deemed must follow from holding it to be void if the other is so declared to be.

Looking comprehensively at these contentions of the parties it plainly results that the conflict between them is

much narrower than it would seem to be because the premise which the arguments of the plaintiffs in error attribute to the propositions of the United States is by it denied. On the very face of things it is clear that the United States disclaims the gloss put upon its contentions by limiting them to the propositions which we have hitherto pointed out, since it rests the contentions which it makes as to the assailed provision of the suffrage amendment solely upon the ground that it involves an unmistakable, although it may be a somewhat disguised, refusal to give effect to the prohibitions of the Fifteenth Amendment by creating a standard which it is repeated but calls to life the very conditions which that Amendment was adopted to destroy and which it had destroyed.

The questions then are: (1) Giving to the propositions of the Government the interpretation which the Government puts upon them and assuming that the suffrage provision has the significance which the Government assumes it to have, is that provision as a matter of law repugnant to the Fifteenth Amendment? which leads us of course to consider the operation and effect of the Fifteenth Amendment. (2) If yes, has the assailed amendment in so far as it fixes a standard for voting as of January 1, 1866, the meaning which the Government attributes to it? which leads us to analyze and interpret that provision of the amendment. (3) If the investigation as to the two prior subjects establishes that the standard fixed as of January 1, 1866, is void, what if any effect does that conclusion have upon the literacy standard otherwise established by the amendment? which involves determining whether that standard, if legal, may survive the recognition of the fact that the other or 1866 standard has not and never had any legal existence. Let us consider these subjects under separate headings.

1. *The operation and effect of the Fifteenth Amendment.* This is its text:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

(a) Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and the State would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

(b) But it is equally beyond the possibility of question that the Amendment in express terms restricts the power of the United States or the States to abridge or deny the right of a citizen of the United States to vote on account of race, color or previous condition of servitude. The restriction is coincident with the power and prevents its exertion in disregard of the command of the Amendment. But while this is true, it is true also that the Amendment does not change, modify or deprive the States of their full power as to suffrage except of course as to the subject with which the Amendment deals and to the extent that obedience to its command is necessary. Thus the authority over suffrage which the States possess and the limitation which the Amendment imposes are coördinate and one may not destroy the other without bringing about the destruction of both.

(c) While in the true sense, therefore, the Amendment

gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect; that is to say, that as the command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed, the result might arise that as a consequence of the striking down of a discriminating clause a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out. *Ex parte Yarbrough,* 110 U. S. 651; *Neal* v. *Delaware,* 103 U. S. 370. A familiar illustration of this doctrine resulted from the effect of the adoption of the Amendment on state constitutions in which at the time of the adoption of the Amendment the right of suffrage was conferred on all white male citizens, since by the inherent power of the Amendment the word white disappeared and therefore all male citizens without discrimination on account of race, color or previous condition of servitude came under the generic grant of suffrage made by the State.

With these principles before us how can there be room for any serious dispute concerning the repugnancy of the standard based upon January 1, 1866 (a date which preceded the adoption of the Fifteenth Amendment), if the suffrage provision fixing that standard is susceptible of the significance which the Government attributes to it? Indeed, there seems no escape from the conclusion that to hold that there was even possibility for dispute on the subject would be but to declare that the Fifteenth Amendment not only had not the self-executing power which it has been recognized to have from the beginning, but that its provisions were wholly inoperative because susceptible of being rendered inapplicable by mere forms of expression embodying no exercise of judgment and resting upon no discernible reason other than the purpose to disregard the prohibitions of the Amendment by creating a standard of

voting which on its face was in substance but a revitalization of conditions which when they prevailed in the past had been destroyed by the self-operative force of the Amendment.

2. *The standard of January 1, 1866, fixed in the suffrage amendment and its significance.*

The inquiry of course here is, Does the amendment as to the particular standard which this heading embraces involve the mere refusal to comply with the commands of the Fifteenth Amendment as previously stated? This leads us for the purpose of the analysis to recur to the text of the suffrage amendment. Its opening sentence fixes the literacy standard which is all-inclusive since it is general in its expression and contains no word of discrimination on account of race or color or any other reason. This however is immediately followed by the provisions creating the standard based upon the condition existing on January 1, 1866, and carving out those coming under that standard from the inclusion in the literacy test which would have controlled them but for the exclusion thus expressly provided for. The provision is this:

"But no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution."

We have difficulty in finding words to more clearly demonstrate the conviction we entertain that this standard has the characteristics which the Government attributes to it than does the mere statement of the text. It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence since it is based

purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment to make them the basis of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment: And the same result, we are of opinion, is demonstrated by considering whether it is possible to discover any basis of reason for the standard thus fixed other than the purpose above stated. We say this because we are unable to discover how, unless the prohibitions of the Fifteenth Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the Fifteenth Amendment. Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the Fifteenth Amendment was in view.

While these considerations establish that the standard fixed on the basis of the 1866 test is void, they do not enable us to reply even to the first question asked by the court below, since to do so we must consider the literacy standard established by the suffrage amendment and the possibility of its surviving the determination of the fact that the 1866 standard never took life since it was void from the beginning because of the operation upon it of the prohibitions of the Fifteenth Amendment. And this brings us to the last heading:

3. *The determination of the validity of the literacy test and the possibility of its surviving the disappearance of the 1866*

standard with which it is associated in the suffrage amendment.

No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted. Whether this test is so connected with the other one relating to the situation on January 1, 1866, that the invalidity of the latter requires the rejection of the former is really a question of state law, but in the absence of any decision on the subject by the Supreme Court of the State, we must determine it for ourselves. We are of opinion that neither forms of classification nor methods of enumeration should be made the basis of striking down a provision which was independently legal and therefore was lawfully enacted because of the removal of an illegal provision with which the legal provision or provisions may have been associated. We state what we hold to be the rule thus strongly because we are of opinion that on a subject like the one under consideration involving the establishment of a right whose exercise lies at the very basis of government a much more exacting standard is required than would ordinarily obtain where the influence of the declared unconstitutionality of one provision of a statute upon another and constitutional provision is required to be fixed. Of course, rigorous as is this rule and imperative as is the duty not to violate it, it does not mean that it applies in a case where it expressly appears that a contrary conclusion must be reached if the plain letter and necessary intendment of the provision under consideration so compels, or where such a result is rendered necessary because to follow the contrary course would give rise to such an extreme and anomalous situation as would cause it to be impossible to conclude that it could have been upon any hypothesis whatever within the mind of the law-making power.

Does the general rule here govern or is the case controlled by one or the other of the exceptional conditions which we have just stated, is then the remaining question to be decided. Coming to solve it we are of opinion that by a consideration of the text of the suffrage amendment in so far as it deals with the literacy test and to the extent that it creates the standard based upon conditions existing on January 1, 1866, the case is taken out of the general rule and brought under the first of the exceptions stated. We say this because in our opinion the very language of the suffrage amendment expresses, not by implication nor by forms of classification nor by the order in which they are made, but by direct and positive language the command that the persons embraced in the 1866 standard should not be under any conditions subjected to the literacy test, a command which would be virtually set at naught if on the obliteration of the one standard by the force of the Fifteenth Amendment the other standard should be held to continue in force.

The reasons previously stated dispose of the case and make it plain that it is our duty to answer the first question, No, and the second, Yes; but before we direct the entry of an order to that effect we come briefly to dispose of an issue the consideration of which we have hitherto postponed from a desire not to break the continuity of discussion as to the general and important subject before us.

In various forms of statement not challenging the instructions given by the trial court concretely considered concerning the liability of the election officers for their official conduct, it is insisted that as in connection with the instructions the jury was charged that the suffrage amendment was unconstitutional because of its repugnancy to the Fifteenth Amendment, therefore taken as a whole the charge was erroneous. But we are of opinion that this contention is without merit, especially in view

of the doctrine long since settled concerning the self-executing power of the Fifteenth Amendment and of what we have held to be the nature and character of the suffrage amendment in question. The contention concerning the inapplicability of § 5508, Rev. Stat., now § 19 of the Penal Code, or of its repeal by implication, is fully answered by the ruling this day made in *United States* v. *Mosley*, No. 180, *post*, p. 383.

We answer the first question, No, and the second question, Yes.

And it will be so certified.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

MYERS AND OTHERS *v.* ANDERSON.

SAME *v.* HOWARD.

SAME *v.* BROWN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Nos. 8, 9, 10. Argued November 11, 1913.—Decided June 21, 1915.

Guinn v. *United States*, *ante*, p. 347, followed as to the effect and operation of the Fifteenth Amendment and that a State may not establish as a standard for exercising suffrage a standard existing prior to the adoption of that Amendment and which was rendered illegal thereby.

While the Fifteenth Amendment does not confer the right of suffrage on any class, it does prohibit the States from depriving any person of the right of suffrage whether for Federal, state or municipal elections.

Election officers who refuse to allow persons to exercise their suffrage because of a state law disqualifying them according to a standard made unconstitutional by the Fifteenth Amendment are liable for damages in a civil action under § 1979, Rev. Stat.

Where the standards fixed for voters are several in number, but are all so interrelated that one cannot be held invalid without affecting the others, the entire provision must fail.

Where a statute establishing qualifications for exercising suffrage is unconstitutional, it does not deprive the citizens of the right to vote, as the previously existing statute is unaffected by the attempted adoption of one that is void for unconstitutionality.

The so-called Grandfather Clause in the statute of Maryland of 1908 fixing the qualifications of voters at municipal elections in the City of Annapolis, based on the right of the citizen or his ancestor to vote at a date prior to the adoption of the Fifteenth Amendment is unconstitutional because the standards then existing have been made illegal by the self-operating force of the Fifteenth Amendment.

182 Fed. Rep. 223, affirmed.

THE facts, which involve the constitutionality under the Fifteenth Amendment to the Constitution of the United States, of the statute of Maryland fixing qualification of voters and containing what has been known as the Grandfather's Clause, and the construction and application of § 1979, Rev. Stat., are stated in the opinion.

Mr. William L. Marbury and *Mr. Ridgley P. Melvin*, with whom *Mr. William L. Rawls* was on the brief, for plaintiff in error:

The cases at bar are controlled by the case of *Giles* v. *Harris*, 189 U. S. 475.

The portions of § 4 of the Annapolis Registration Law which are alleged in the declaration to be void because of being in conflict with the Fifteenth Amendment, constitute the only part of that law which makes any change in the preëxisting law prescribing qualifications for registration and suffrage in the City of Annapolis.

The legislature would, therefore, certainly not have enacted this law without these provisions. Therefore,

an averment that these provisions are void is equivalent to an averment that the whole Annapolis Registration Law is void. Therefore, under *Giles* v. *Harris* the plaintiffs are not entitled to maintain the suit.

Aside from the above, and irrespective of the allegations of the declaration, it is plain that the Annapolis Registration Law is either valid as a whole or void as a whole. But the defendants as registrars had no power or authority to register the plaintiffs, except such as was derived from this law. It is admitted that they were appointed under that law, and had no power to act under any other law. If, therefore, the law in question is void, they had no power or legal authority to register the plaintiffs, and the plaintiffs cannot recover damages against them on account of their failure to do so.

Even if the court were to be of opinion that Class 3, the so-called Grandfather's Clause, alone was void, that it was separable from the balance of the act, and that the balance of the act was valid, still the plaintiffs would not be entitled to recover, because it is admitted that they were disqualified under Classes 1, 2 and 2½, the Property Clause, and Naturalized Citizen Clause of the act.

Conclusion: It follows that the question as to whether the Annapolis Registration Act or the Grandfather's Clause of that act is valid or invalid, constitutional or unconstitutional, is not involved in this case, and will not be passed upon by the court, for the reason that in neither event are the plaintiffs entitled to recover.

Such a conclusion will not mean that the Fifteenth Amendment is waste paper and cannot be enforced. If that Amendment is applicable to state elections and municipal elections, it can be enforced in a case like this by Congress by legislation directed at the State of Maryland instead of at individuals, as authorized by § 2 of the Fifteenth Amendment, under which Congress is empowered

to compel a State to obey the Amendment by "appropriate legislation."

The Grandfather's Clause is not violative of the Fifteenth Amendment. Even if this clause excluded all negroes, it would not necessarily follow that they were excluded on account of their race. They might have been excluded on account of their politics. They might have been excluded on account of some characteristic, mental, moral or temperamental, such exclusion might be entirely unjust or morally wrong, but it would not be violative of the Fifteenth Amendment.

The declarations filed in these cases are insufficient in law, because they fail to allege that the action of the defendants in refusing to register the plaintiffs was corrupt or malicious.

Malice is an essential allegation in a suit of this kind against registration officers at common law.

The few cases holding the contrary are based upon a mistaken view of what was decided in *Ashby* v. *White*.

Revised Stat., § 1979, under which these suits are brought, gives no new or different right of action from that given by the common law, but only such right of action as would be a proper proceeding for redress at common law, and does not dispense with the necessity of alleging and proving malice.

Revised Stat., § 1979, has no application to the cases at bar, because it was passed solely to protect the civil rights guaranteed or secured under the Fourteenth Amendment, *Holt* v. *Indiana Mfg. Co.*, 176 U. S. 68; *Wadleigh* v. *Newhall*, 136 Fed. Rep. 946.

In any event, the acts complained of by plaintiffs do not constitute a deprivation of any right, privilege or immunity secured by the Constitution and laws of the United States within the meaning of Rev. Stat., § 1979. *Carter* v. *Greenhow*, 114 U. S. 317.

The inhibitions contained in the Fifteenth Amendment

against the denial or abridgment of the right of citizens of the United States to vote on account of race, color or previous condition of servitude, is by the plain language of the Amendment made to apply only to the right to vote which citizens of the United States have by virtue of such citizenship, that is, the right to vote derived from the United States, and not such right to vote as they derive from the States, and the inhibition therein contained does not apply to or in any way affect the right of a citizen of a State to vote at state or municipal elections, such right being derived exclusively from the State, and not inhering in any man in his capacity as a citizen of the United States.

The Fourteenth Amendment provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." This inhibition applies only to privileges or immunities of citizens of the United States as such, as distinguished from the citizens of a State. The canon of construction announced in *Slaughter House Cases* equally applicable to the Fifteenth Amendment, which is in precisely similar language.

The distinction between national and state citizenship and their respective privileges there drawn, i. e., in *Slaughter House Cases*, has come to be firmly established. *Twining* v. *New Jersey*, 211 U. S. 96.

The legislative history of the Fifteenth Amendment confirms the above as a proper construction. As originally introduced, the amendment read: "No State shall deny or abridge the right of its citizens to vote and hold office on account of race, color or previous condition." The Judiciary Committee reported back the resolution, striking out the words "the right of its citizens" (i. e., the citizens of the State), and substituting the words "the right of citizens of the United States to votes."

The right to vote for members of Congress is a right

possessed by a citizen of the United States as such, said right being derived primarily not from a State, but from the United States. *Ex parte Yarbrough*, 110 U. S. 651; *Wiley* v. *Sinkler*, 179 U. S. 58; *Swafford* v. *Templeton*, 185 U. S. 491.

The opinions expressed by members of Congress during the debate on the Amendment do not constitute any guide for its construction. The meaning of the act must be determined from the language used therein. *United States* v. *Freight Association*, 166 U. S. 318.

From *United States* v. *Reese*, 92 U. S. 214, to *James* v. *Bowman*, 190 U. S. 122, the courts have overruled the construction placed by Congress on the Fifteenth Amendment by striking down as unconstitutional the statutes passed to enforce it.

The question of the applicability of the inhibitions of the Fifteenth Amendment to state or municipal elections were not necessarily involved in those cases, the point was not raised or considered, and therefore cannot be deemed to have been adjudicated. *Neal* v. *Delaware*, 103 U. S. 370.

The words "right of a citizen of the United States to vote" in the Fifteenth Amendment do not in any event mean or refer to the right to vote in corporate bodies created solely by legislative will, and wherein such right is dependent altogether upon legislative discretion, as in municipal corporations.

The words "right to vote" as used in the statutes or constitutions generally means the right to vote at elections of a public general character, and not at municipal elections. There is a great weight of authority to this effect, especially Maryland cases.

If construed to have reference to voting at state or municipal elections, the Fifteenth Amendment would be beyond the amending power conferred upon three-fourths of the States by Art. V of the Constitution, and therefore, the Amendment should not receive that construction, it

is fairly open to a more limited construction. *Knights Templar Indemnity Co.* v. *Jarman*, 187 U. S. 197.

Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 407.

The right to determine for itself who shall constitute its electorate, is one of the functions essential to the existence of a State, and any invasion of that right is beyond the power of amendment conferred upon three-fourths of the States by the people in the adoption of the Constitution; otherwise there could be no indestructible States. *Texas* v. *White*, 7 Wall. 700; *Lane County* v. *Oregon*, 7 Wall. 71.

If construed to be applicable to state or municipal elections, the Fifteenth Amendment would fall within the express prohibition contained in Art. V of the Constitution against any amendment which would deprive a State of its equal representation in the Senate without its consent. *Texas* v. *White*, 7 Wall. 700; article by Arthur W. Machen, Jr., in 23 Har. Law Review, pp. 169 to 193.

Numerous authorities of this and other courts besides these cited support these contentions.

Mr. Edgar H. Gans, with whom *Mr. Morris A. Soper* and *Mr. Daniel R. Randall* were on the brief, for defendant in error:

The evidence was legally sufficient.

It is not necessary that wrong should be willful and malicious.

A specific right to vote is given substantially in this case by the Fifteenth Amendment.

There is a remedy by act of Congress and § 1979, Rev. Stat., applies.

The Fifteenth Amendment applies to municipal elections.

The Act of 1908 is only void in part.

The Fifteenth Amendment extends to state elections.

In support of these contentions, see *Aultman* v. *Brownfield*, 102 Fed. Rep. 13; *Bevard* v. *Hoffman*, 18 Maryland, 479; *Brickhouse* v. *Brooks*, 165 Fed. Rep. 534; *Carter* v. *Greenhow*, 114 U. S. 317; *Civil Rights Cases*, 109 U. S. 3; *County Com.* v. *Duckett*, 20 Maryland, 478; *Dwight* v. *Rice*, 5 La. Ann. 580; *Ellis* v. *United States*, 206 U. S. 246; *Gibson* v. *Mississippi*, 162 U. S. 591; *Giles* v. *Harris*, 189 U. S. 475; *Hambleton* v. *Rathborn*, 175 U. S. 144; *Hanna* v. *Young*, 84 Maryland, 179; *Hemsley* v. *Myers*, 45 Fed. Rep. 290; *Holt* v. *Indiana Mfg. Co.*, 176 U. S. 68; *Howell* v. *Pate*, 119 Georgia, 539; *Iowa* v. *Des Moines*, 96 Iowa, 186; *Karem* v. *United States*, 121 Fed. Rep. 252; *McCain* v. *Des Moines*, 174 U. S. 175; *Neale* v. *Delaware*, 103 U. S. 370; *Pattison* v. *Bark Eudora*, 190 U. S. 169; *Pope* v. *Williams*, 98 Maryland, 66; *S. C.*, 193 U. S. 621; *Shaeffer* v. *Gilbert*, 73 Maryland, 66; *Sutherland* v. *Norris*, 74 Maryland, 326; *United States* v. *Bowman*, 100 U. S. 508; *United States* v. *Cruikshank*, 25 Fed. Rep. 712; *United States* v. *Lackey*, 99 Fed. Rep. 956; *United States* v. *Oregon Co.*, 164 U. S. 256; *United States* v. *Reese*, 92 U. S. 214; *Vietor* v. *Arthur*, 104 U. S. 498; *Wadley* v. *Newhall*, 136 Fed. Rep. 946; *Willis* v. *Kalmbach*, 64 S. E. Rep. 342; *Wood* v. *Fitzgerald*, 3 Oregon, 563; *Ex parte Yarbrough*, 110 U. S. 651; see also Acts of May 31, 1870, c. 114, now Rev. Stat., § 2004, and Act of Apr. 20, 1871, c. 22, now Rev. Stat., § 1979; Acts of Assembly of Maryland, 1908, c. 525 and of 1896, c. 202, § 38; Constitution of Maryland, Art. I, § 1.

Mr. Chief Justice White delivered the opinion of the court.

These cases involve some questions which were not in the *Guinn Case*, No. 96, just decided, *ante*, p. 347. The

foundation question, however, is the same, that is, the operation and effect of the Fifteenth Amendment.

Prior to the adoption of the Fifteenth Amendment the privilege of suffrage was conferred by the constitution of Maryland of 1867 upon "every white male citizen," but the Fifteenth Amendment by its self-operative force obliterated the word white and caused the qualification therefor to be "every male citizen" and this came to be recognized by the Court of Appeals of the State of Maryland. Without recurring to the establishment of the City of Annapolis as a municipality in earlier days or following the development of its government, it suffices to say that before 1877 the right to vote for the governing municipal body was vested in persons entitled to vote for members of the General Assembly of Maryland, which standard by the elimination of the word white from the constitution by the Fifteenth Amendment embraced "every male citizen." In 1896 a general election law comprising many sections was enacted in Maryland. (Laws of 1896, c. 202, p. 327.) It is sufficient to say that it provided for a board of supervisors of elections in each county to be appointed by the governor and that this board was given the power to appoint two persons as registering officers and two as judges of election for each election precinct or ward in the county. Under this law each ward or voting precinct in Annapolis became entitled to two registering officers. While the law made these changes in the election machinery it did not change the qualification of voters.

In 1908 an act was passed "to fix the qualifications of voters at municipal elections in the City of Annapolis and to provide for the registration of said voters." (Laws of 1908, c. 525, p. 347.) This law authorized the appointment of three persons as registers, instead of two, in each election ward or precinct in Annapolis and provided for the mode in which they should perform their duties and conferred the right of registration and consequently the

right to vote on all male citizens above the age of twenty-one years who had resided one year in the municipality and had not been convicted of crime and who came within any one of the three following classes:

"1. All taxpayers of the City of Annapolis assessed on the city books for at least five hundred dollars. 2. And duly naturalized citizens. 2½. And male children of naturalized citizens who have reached the age of twenty-one years. 3. All citizens who, prior to January 1, 1868, were entitled to vote in the State of Maryland or any other State of the United States at a state election, and the lawful male descendants of any person who prior to January 1, 1868, was entitled to vote in this State or in any other State of the United States at a state election, and no person not coming within one of the three enumerated classes shall be registered as a legal voter of the City of Annapolis or qualified to vote at the municipal elections held therein, and any person so duly registered shall, while so registered, be qualified to vote at any municipal election held in said city; said registration shall in all other respects conform to the laws of the State of Maryland relating to and providing for registration in the State of Maryland."

The three persons who are defendants in error in these cases applied in Annapolis to the board of registration to be registered as a prerequisite to the enjoyment of their right to vote at an election to be held in July, 1909, and they were denied the right by a vote of two out of the three members of the board. They consequently were unable to vote. Anderson, the defendant in error in No. 8, was a negro citizen who possessed all the qualifications required to vote exacted by the law in existence prior to the one we have just quoted, and who on January 1, 1868, the date fixed in the third class in the act in question, would have been entitled to vote in Maryland but for the fact that he was a negro, albeit he possessed none of the

particular qualifications enumerated by the statute in question. Howard, the defendant in error in No. 9, was a negro citizen possessing all the qualifications to vote required before the passage of the act in question, whose grandfather resided in Maryland and would have been entitled to vote on January 1, 1868, but for the fact that he was a negro. Brown, the defendant in error in No. 10, also had all the qualifications to vote under the law previously existing and his father was a negro residing in Maryland who would have been able to vote on the date named but for the fact that he was a negro. The three parties thereupon began these separate suits to recover damages against the two registering officers who had refused to register them on the ground that thereby they had been deprived of a right to vote secured by the Fifteenth Amendment and that there was liability for damages under § 1979, Rev. Stat., which is as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The complaints were demurred to and it would seem that every conceivable question of law susceptible of being raised was presented and considered, and the demurrers were overruled, the grounds for so doing being stated in one opinion common to the three cases (182 Fed. Rep. 223). The cases were then tried to the court without a jury, and to the judgments in favor of the plaintiffs which resulted these three separate writs of error were prosecuted.

The non-liability in any event of the election officers for their official conduct is seriously pressed in argument, and

it is also urged that in any event there could not be liability under the Fifteenth Amendment for having deprived of the right to vote at a municipal election. But we do not undertake to review the considerations pressed on these subjects because we think they are fully disposed of by the ruling this day made in the *Guinn Case* and by the very terms of § 2004, Rev. Stat., when considered in the light of the inherently operative force of the Fifteenth Amendment as stated in the case referred to.

This brings us to consider the statute in order to determine whether its standards for registering and voting are repugnant to the Fifteenth Amendment. There are three general criteria. We test them by beginning at the third, as it is obviously the most comprehensive and, as we shall ultimately see, the keystone of the arch upon which all the others rest. In coming to do so it is at once manifest that barring some negligible changes in phraseology that standard is in all respects identical with the one just decided in the *Guinn Case* to be repugnant to the Fifteenth Amendment and we pass from its consideration and approach the first and a subdivision numbered 2½. The first confers the right to register and vote free from any distinction on account of race or color upon all taxpayers assessed for at least $500. We put all question of the constitutionality of this standard out of view as it contains no express discrimination repugnant to the Fifteenth Amendment and it is not susceptible of being assailed on account of an alleged wrongful motive on the part of the lawmaker or the mere possibilities of its future operation in practice and because as there is a reason other than discrimination on account of race or color discernible upon which the standard may rest, there is no room for the conclusion that it must be assumed, because of the impossibility of finding any other reason for its enactment, to rest alone upon a purpose to violate the Fifteenth Amendment. And as in order to dispose of the case, as

we shall see, it is not necessary to examine the constitutionality of the other standards, that is, numbers 2 and 2½ relating to naturalized citizens and their descendants, merely for the sake of argument we assume those two standards, without so deciding, to be also free from constitutional objection and come to consider the case under that hypothesis.

The result then is this, that the third standard is void because it amounts to a mere denial of the operative effect of the Fifteenth Amendment and, based upon that conception, proceeds to re-create and reëstablish a condition which the Amendment prohibits and the existence of which had been previously stricken down in consequence of the self-operative force of its prohibitions; and the other standards separately considered are valid or are assumed to be such and therefore are not violative of the Fifteenth Amendment. On its face, therefore, this situation would establish that the request made by all the plaintiffs for registration was rightfully refused since even if the void standard be put wholly out of view, none of the parties had the qualifications necessary to entitle them to register and vote under any of the others. This requires us therefore to determine whether the two first standards which we have held were valid or have assumed to be so must nevertheless be treated as non-existing as the necessary result of the elimination of the third standard because of its repugnancy to the prohibition of the Fifteenth Amendment. And by this we are brought therefore to determine the interrelation of the provisions and the dependency of the two first including the substandard under the second upon the third; in other words, to decide whether or not such a unity existed between the standards that the destruction of one necessarily leaves no possible reason for recognizing the continued existence and operative force of the others.

In the *Guinn Case* this subject was also passed upon and

it was held that albeit the decision of the question was in the very nature of things a state one, nevertheless in the absence of controlling state rulings it was our duty to pass upon the subject and that in doing so the overthrow of an illegal standard would not give rise to the destruction of a legal one unless such result was compelled by one or both of the following conditions: (a) Where the provision as a whole plainly and expressly established the dependency of the one standard upon the other and therefore rendered it necessary to conclude that both must disappear as the result of the destruction of either; and (b) where even although there was no express ground for reaching the conclusion just stated, nevertheless that view might result from an overwhelming implication consequent upon the condition which would be created by holding that the disappearance of the one did not prevent the survival of the other, that is, a condition which would be so unusual, so extreme, so incongruous as to leave no possible ground for the conclusion that the death of the one had not also carried with it the cessation of the life of the other.

That both of these exceptions here obtain we think is clear: First, because looking at the context of the provision we think that the obvious purpose was not to subject to the exactions of the first standard (the property qualification) any person who was included in the other standards; and second, because the result of holding that the other standards survived the striking down of the third would be to bring about such an abnormal result as would bring the case within the second exception, since it would come to pass that every American born citizen would be deprived of his right to vote unless he was able to comply with the property qualification and all naturalized citizens and their descendants would be entitled to vote without being submitted to any property qualification whatever. If the clauses as to naturalization were

assumed to be invalid, the incongruous result just stated would of course not arise, but the legal situation would be unchanged since that view would not weaken the conclusion as to the unity of the provisions of the statute, but on the contrary would fortify it.

But it is argued even although this result be conceded, there nevertheless was no right to recover and there must be a reversal since if the whole statute fell, all the clauses providing for suffrage fell and no right to suffrage remained and hence no deprivation or abridgment of the right to vote resulted. But this in a changed form of statement advances propositions which we have held to be unsound in the *Guinn Case*. The qualification of voters under the constitution of Maryland existed and the statute which previously provided for the registration and election in Annapolis was unaffected by the void provisions of the statute which we are considering. The mere change in some respects of the administrative machinery by the new statute did not relieve the new officers of their duty nor did it interpose a shield to prevent the operation upon them of the provisions of the Constitution of the United States and the statutes passed in pursuance thereof. The conclusive effect of this view will become apparent when it is considered that if the argument were accepted, it would follow that although the Fifteenth Amendment by its self-operative force without any action of the State changed the clause in the constitution of the State of Maryland conferring suffrage upon "every white male citizen" so as to cause it to read "every male citizen," nevertheless the Amendment was so supine, so devoid of effect as to leave it open for the legislature to write back by statute the discriminating provision by a mere changed form of expression into the laws of the State and for the state officers to make the result of such action successfully operative.

There is a contention pressed concerning the applica-

tion of the statute upon which the suits were based to the acts in question. But we think in view of the nature and character of the acts, of the self-operative force of the Fifteenth Amendment and of the legislation of Congress on the subject that there is no ground for such contention.

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of these cases.

UNITED STATES *v.* MOSLEY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 180. Submitted October 17, 1913.—Decided June 21, 1915.

Section 19 of the Criminal Code, § 5508 Rev. Stat., punishing conspiracy to injure, oppress or intimidate any citizen in the full exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States is constitutional and constitutionally extends protection to the right to vote for members of Congress and to have the vote when cast counted.

While § 19 of the Criminal Code when originally enacted was § 6 of the Enforcement Act and Congress then had in mind the doings of the Ku Klux and the like against negroes, the statute dealt at the time with all Federal rights of all citizens and protected them all, and still continues so to do.

Section 19, Criminal Code, applies to the acts of two or more election officers who conspire to injure and oppress qualified voters of the district in the exercise of their right to vote for member of Congress by omitting the votes cast from the count and the return to the state election board.

THE facts, which involve the construction and application of § 5508, Rev. Stat., and § 19 of the Penal Code, are stated in the opinion.

Mr. Solicitor General Davis for the United States:

Congress may, by appropriate legislation, protect any right or privilege arising from, created or secured by, or dependent upon, the Constitution of the United States. *Ex parte Virginia*, 100 U. S. 339, 345; *Ex parte Yarbrough*, 110 U. S. 651, 663; *Hodges* v. *United States*, 203 U. S. 1, 24; *Logan* v. *United States*, 144 U. S. 263, 293; *Strauder* v. *West Virginia*, 100 U. S. 303, 310; *United States* v. *Reese*, 92 U. S. 214, 217.

The right of suffrage in the election of members of Congress is such a right. *Ex parte Yarbrough, supra; Felix* v. *United States*, 186 Fed. Rep. 685, 688; *Swafford* v. *Templeton*, 185 U. S. 487; *Wiley* v. *Sinkler*, 179 U. S. 58.

This right, together with others thus created or secured, is protected by § 19, Crim. Code. Cases *supra*.

Consequently, § 19, both generally and in its application to the elective franchise, is constitutional. *Motes* v. *United States*, 178 U. S. 458; *United States* v. *Waddell*, 112 U. S. 76.

The right of suffrage secured by the Constitution consists not merely of the right to cast a ballot but likewise of the right to have that ballot counted.

The right in question arises equally from the second and fourth sections of Article I of the Constitution. *Ex parte Yarbrough*, 110 U. S. 660–664.

Upon whichever section it depends, it must include the right to have the vote counted. *Ex parte Clark*, 100 U. S. 399; *Ex parte Siebold*, 100 U. S. 371; *In re Coy*, 127 U. S. 731; *United States* v. *Gale*, 109 U. S. 65.

Any conspiracy to interfere with or prevent the free exercise or enjoyment of the constitutional right of suffrage is in violation of § 19, Crim. Code.

When applied to the elective franchise, the inference is that the statute was designed to prevent any act whereby the complete exercise of that privilege might be prevented or impeded, and not merely attacks or threats directed

against the voter's person. See *United States* v. *Morris*, 125 Fed. Rep. 322; *United States* v. *Stone*, 188 Fed. Rep. 836, 840; *United States* v. *Waddell*, 112 U. S. 80.

No brief or appearance for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment under § 19 of the Criminal Code, Act of March 4, 1909, c. 321, 35 Stat. 1088, 1092. It was demurred to and the demurrer was sustained by the District Court on the ground that the section did not apply to the acts alleged. As the judgment on the face of it turned upon the construction of the statute the United States brought the case to this court.

The indictment contains four counts. The first charges a conspiracy of the two defendants, who were officers and a majority of the county election board of Blaine County, Oklahoma, to injure and oppress certain legally qualified electors, citizens of the United States, being all the voters of eleven precincts in the county, in the free exercise and enjoyment of their right and privilege, under the Constitution and laws of the United States, of voting for a Member of Congress for their district. To that end, it is alleged, the defendants agreed that irrespective of the precinct returns being lawful and regular they would omit them from their count and from their returns to the state election board. The second count charges the same conspiracy, a secret meeting of the defendants without the knowledge of the third member of their board for the purpose of carrying it out, and the overt act of making a false return, as agreed, omitting the returns from the named precincts although regular and entitled to be counted. The third count is like the first with the addition of some details of the plan, intended to deceive the third member of their board. The

fourth charges the same conspiracy, but states the object as being to injure and oppress the same citizens for and on account of their having exercised the right described.

The section is as follows: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." It is not open to question that this statute is constitutional, and constitutionally extends some protection at least to the right to vote for Members of Congress. *Ex parte Yarbrough*, 110 U. S. 651. *Logan* v. *United States*, 144 U. S. 263, 293. We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box.

The only matter that needs argument is that upon which the District Court expressed its view—whether properly construed the statute purports to deal with such conduct as that of the defendants, assuming that there is no lack of power if such be its intent. Manifestly the words are broad enough to cover the case, but the argument that they have a different scope is drawn from the fact that originally this section was part of the Enforcement Act of May 31, 1870, c. 114, § 6, 16 Stat. 140, 141 (later, Rev. Stat., § 5508), and that by an earlier section of the same statute, § 4 (later, Rev. Stat., § 5506), every person who by any unlawful means hindered or combined with others to hinder any citizen from voting at any election

in any State, &c., was subjected to a much milder penalty than that under § 6. It may be thought that the Act of 1870 cannot have meant to deal a second time and in a much severer way in § 6 with what it had disposed of a few sentences before. The other sections have been repealed, but § 19, it may be said, must mean what it meant in 1870 when the Enforcement Act was passed, and what it did mean will be seen more clearly from its original words.

In its original form the section began "If two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provisions of this Act, or to injure, oppress," &c. The source of this section in the doings of the Ku Klux and the like is obvious and acts of violence obviously were in the mind of Congress. Naturally Congress put forth all its powers. But this section dealt with Federal rights and with all Federal rights, and protected them in the lump, whereas § 4, Rev. Stat., § 5506, dealt only with elections, and although it dealt with them generally and might be held to cover elections of Federal officers, it extended to all elections. It referred to conspiracies only as incident to its main purpose of punishing any obstruction to voting at any election in any State. The power was doubtful and soon was held to have been exceeded, *United States* v. *Reese*, 92 U. S. 214. See *Logan* v. *United States*, 141 U. S. 263. The subject was not one that called for the most striking exercise of such power as might exist. Any overlapping that there may have been well might have escaped attention, or if noticed have been approved, when we consider what must have been the respective emphasis in the mind of Congress when the two sections were passed.

But § 6 being devoted, as we have said, to the protection of all Federal rights from conspiracies against them, naturally did not confine itself to conspiracies contem-

plating violence, although under the influence of the conditions then existing it put that class in the front. Just as the Fourteenth Amendment, to use the happy analogy suggested by the Solicitor General, was adopted with a view to the protection of the colored race but has been found to be equally important in its application to the rights of all, § 6 had a general scope and used general words that have become the most important now that the Ku Klux have passed away. The change of emphasis is shown by the wording already transposed in Rev. Stat., § 5508, and now in § 19. The clause as to going in disguise upon the highway has dropped into a subordinate place, and even there has a somewhat anomalous sound. The section now begins with sweeping general words. Those words always were in the act, and the present form gives them a congressional interpretation. Even if that interpretation would not have been held correct in an indictment under § 6, which we are far from intimating, and if we cannot interpret the past by the present, we cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which on its face § 19 most reasonably affords.

Judgment reversed.

MR. JUSTICE MCREYNOLDS did not sit in this case.

MR. JUSTICE LAMAR, dissenting.

I dissent from the judgment that state election officers are subject to indictment in Federal courts for wrongfully refusing to receive and count election returns.

In this case the indictment charges a violation of Rev. Stat., § 5508 (Penal Code, § 19) which makes it an offense to 'conspire to injure, oppress, threaten or intimidate any citizen in the free exercise and enjoyment of any right or privilege secured to him by the laws and Constitution of

the United States.' And the indictment charges that these two defendants, '*being then and there members of the County Election Board of Blaine County, Oklahoma,*' did conspire to deprive certain unnamed voters of such right and in pursuance of that conspiracy threw out the returns from several election precincts.

The section under which the indictment is brought was originally a part of the Act of 1870, appearing as § 5508 [1] in Chapter 7 of the Revised Statutes, headed "CRIMES AGAINST THE ELECTIVE FRANCHISE AND CIVIL RIGHTS OF CITIZENS." The Act and the Chapter contained many sections—ten of them (§§ 5506, 5511, 5512, 5513, 5514, 5515, 5520, 5521, 5522, 5523) related to offenses by persons or officers against the elective franchise,—to crimes by the voter and against the voter, and specifically to offenses by Registrars, Deputy Marshals, Supervisors, and "every officer of an election." Taken together it is perfectly evident that in them Congress intended to legislate comprehensively and exhaustively on the subject of 'crimes against the franchise.' Under one or the other of them, these defendants would have been subject to indictment, but for the fact that all of those 10 sections were explicitly and expressly repealed by the Act of February 8, 1894 (28 Stat. 36).

Those ten election sections having been repealed, it is now sought to indict these officers under § 5508, which

[1] "SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." 16 Stat. 141, § 6.

was not repealed. This is said to be justified on the ground that, in the original act, there was such an overlapping and doubling of offenses that even when those relating to election officers were repealed, a right to prosecute them for conspiracy was retained in § 5508. But this assumes that there was an overlapping when, in fact, the subject of "*crimes against the elective franchise*" and "*crimes against civil rights*" were treated as separate and distinct. The chapter heading (Rev. Stat., §§ 5506–5523) indicates the difference; and though the two subjects were dealt with in the same Act, they were nevertheless treated as distinct. The sections of the original act ran parallel to each other but were separated from each other; and when all those dealing with offenses by election officers were repealed the legislative content of those sections was not poured into § 5508.

The Act of 1870 imposing punishment upon election officers who were agents of the State, was passed in pursuance of the provisions of the Amendment which related to state action, and thus authorized Congress to provide for the punishment of state officers by Federal courts which, prior to that time, could not have been done. The Congressional will on that subject was fully and completely expressed in those parts of the statute which were afterwards repealed. Congress, having dealt so explicitly with offenses by state election officers in the ten repealed sections cannot be supposed to have referred to them indirectly in § 5508, which does not mention voters; or elections; or election officers, but deals with the deprivation of civil rights of a different nature.

As will appear by the Report of the Committee (House Report No. 18, 53rd Cong., 1st session) and debates in the House and Senate during the discussion of the repealing act of 1894, Congress took the view that as elections were held under state laws, by state officers who were subject to punishment by the State for a violation of the election

laws, they should not be subject to indictment in the United States courts. The express and avowed intent was to repeal all statutes which gave Federal courts jurisdiction over elections and over offenses committed by election officers. And to hold that while a single election officer is now immune from prosecution, two or more can be indicted under § 5508, gives an enlarged operation to the theory that an act, not in itself criminal, may be punished if committed by more than one. Such construction also injects § 5508 into a field from which it was excluded when passed in 1870 and into which it cannot now be forced by implication. For under Penal Code (§ 339), § 5508 means now exactly what it did when it was originally enacted.

To reverse the judgment of the lower court quashing this indictment means, in effect, that Congress failed in its avowed purpose to repeal all statutes relating to crimes against the franchise. To hold that by virtue of § 5508 as a conspiracy statute all of these repealed election offenses are retained, when committed by two or more officers, will also lead to the conclusion that in 1870 Congress in the very same statute had included two sections both of which related to the same conspiracy and to the same overt act but which might be punished differently. For, if the District Attorney had indicted under § 5506 for "*combining and confederating to prevent a qualified citizen from voting*," the two defendants might have been punished by a fine of $500 and imprisonment for 12 months; while if the indictment for the very same conduct had been based on § 5508, for "*conspiring to deprive the citizen of a right under the United States law*," the punishment might be a fine of $5,000, imprisonment for 10 years and the loss of the right to hold office under the laws of the United States. Congress certainly never intended in the same breath to make the same act punishable under two different sections in different ways at the option of the prosecuting attorney.

Similar anomalies could be pointed out if § 5508 is to be construed as so all-embracing as to include acts by two in violation of the 10 election sections which have been repealed.

Rev. Stat., § 5508, is highly penal and is to be strictly construed. And that ordinary rule is especially applicable when a statute is sought to be enforced against election officers. For the relation between the States and the Federal Government is such that the power of the United States courts to punish state officers for wrongs committed by them as officers, should be clearly and expressly defined by Congress and not left to implication—especially so when Congress has given such an explicit expression of its intent that election officers should not be punished in the Federal courts.

The Fifteenth Amendment is self-executing in striking the word "white" from all laws granting the right of suffrage. It was not so far self-executing as to define crimes against the franchise or to impose punishments for wrongs against a voter. The amendment provided that Congress should have power to enforce its provisions by appropriate legislation. Congress did so legislate in 1870. In 1894 it expressly repealed the legislation relating to elections. Since that time no subsequent Congress has restored that legislation or anything like it to the statute books. If this be a hiatus in the law (*James* v. *Bowman*, 190 U. S. 127, 139) it cannot be supplied through the operation of a conspiracy statute (§ 5508) which did not contemplate furtive and fraudulent conduct, or a wrong to the public, or to the voters of an entire precinct, or to wrongs like those here charged. It related to conspiracies to *injure, oppress, threaten, intimidate*—to violence, oppression, injury, intimidation; to force on the premises, force on the highway. The nearest approach to a prosecution for an election offense under § 5508 is the *Yarbrough Case*, 110 U. S. 656. But he was not an election officer and

"the beating and wounding" there charged took place on the "highway" remote from the precinct. That form of intimidation and violence was in express terms dealt with in § 5508 and in none of the repealed sections.

Rev. Stat., § 5508, has been in force for 45 years. During those 45 years no prosecution has ever been instituted under it against a state election officer. That non-action but confirms the correctness of the construction that it was never intended to apply to offenses by state election officers. On the general subject see *James* v. *Bowman*, 190 U. S. 127; *Giles* v. *Teasley*, 193 U. S. 149; *Hodges* v. *United States*, 203 U. S. 1; *Green* v. *Mills*, 69 Fed. Rep. 863; *United States* v. *Harris*, 106 U. S. 629; *United States* v. *Cruikshank*, 92 U. S. 558; *Swafford* v. *Templeton*, 185 U. S. 487; *In re Coy*, 127 U. S. 731; *Wiley* v. *Sinkler*, 179 U. S. 58, 66, 67; *Karem* v. *United States*, 121 Fed. Rep. 250, 258 (2), 259; *Seeley* v. *Knox*, 2 Woods (C. C.), 368; *United States* v. *Reese*, 92 U. S. 214; *Holt* v. *Indiana*, 176 U. S. 68, 72, 73; *Wadleigh* v. *New Hall*, 136 Fed. Rep. 941; *Baldwin* v. *Franks*, 120 U. S. 690; *United States* v. *Waddell*, 112 U. S. 76.

OREGON & CALIFORNIA RAILROAD COMPANY v. UNITED STATES.

CERTIFICATE FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 679. Argued April 23, 26, 27, 1915.—Decided June 21, 1915.

Where there are doubts whether a clause be a covenant or condition courts will incline against the latter; and as a general principle a court of equity is reluctant to lend its aid to enforce a forfeiture.

The provisos in the Land Grant Act of July 25, 1866, as amended June 25, 1868, and April 10, 1869, and in the Act of May 4, 1870, to the effect that the lands granted must be sold by railroad com-

panies only to actual settlers in quantities not exceeding 160 acres to each and at a price not exceeding two dollars and fifty cents per acre, are not conditions subsequent, the violation of which result in forfeiture of the grants, but are covenants which are enforceable. This suit, under such circumstances, becomes one to enforce the covenants and not to annul the patents.

The fact that the actions of the railroad companies in connection with the lands granted were known to the government officials and that no action was taken by the Government in regard thereto does not amount to an estoppel against the Government so that it cannot now enforce the covenants.

Acts of Congress granting lands are laws as well as grants and are operative until repealed; the fact that the conditions imposed in the grant were not applicable to the character of the lands furnishes no excuse for antagonistic action, even though it might justify non-action pending further legislation.

The delay in the assertion of a right is not conclusive against its existence, although there may be argument in it.

Under the acts involved there was a complete grant to the railroad company with power to sell limited only as prescribed, and cross complainants and intervenors who have set up alleged rights in the lands by reason of settlement thereon cannot sustain their claims thereto. Nor can there be an absolute right to purchase and settle on lands where there is no compulsion to sell.

The words "actual settlers" indicate no particular individuals; and the uncertainty of the expression prevents any individual from being a *cestui que trust* to enforce the condition of the statute.

In construing land grant statutes the courts cannot, even at the instance of the Government, give a greater sanction to them than Congress intended; nor can the courts give to any parties rights which the statutes did not confer upon them.

As the conditions contained in the grant are enforceable, the railroad company is enjoined from further violating them, but as conditions have changed since the grant was made, the company is further enjoined from making any disposition of the land or cutting or removing the timber thereon until Congress shall have a reasonable opportunity to provide for their disposition by legislation, and in case after six months Congress shall not have acted, the company may apply to the District Court for a modification of the decree.

THIS writ brings up for review a decision of the United States District Court for the District of Oregon decreeing

the forfeiture of the unsold portion of certain lands granted by Congress to certain railroad companies and quieting the title of the United States thereto.

In consequence of a memorial presented to it, Congress, on April 30, 1908, adopted a joint resolution which authorized and directed the Attorney General of the United States to institute and prosecute any and all suits in equity, actions at law, or other proceedings, to enforce any rights or remedies of the United States arising and growing out of either of the following acts of Congress, to-wit: "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," approved July 25, 1866, c. 242, 14 Stat. 239, as amended by the acts approved June 25, 1868, c. 80, 15 Stat. 80, and April 10, 1869, c. 27, 16 Stat. 47, and "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," approved May 4, 1870, c. 69, 16 Stat. 94.

The Attorney General was empowered to assert all rights and remedies existing in favor of the United States, including the claim on behalf of the United States that the lands granted by such acts, or any part of the lands, have been or are forfeited to the United States by reason of any breaches or violations of the terms or conditions of either of such acts which may be alleged or established in such suits, actions or proceedings.

The resolution declared that it was not intended to determine the right of the United States to any such forfeiture or forfeitures, but to fully authorize the Attorney General to assert on behalf of the United States, and the court or courts before which such suits, actions or proceedings might be instituted or pending to entertain, consider and adjudicate, the claim and right of the United States to such forfeiture or forfeitures, and, if found, to enforce the same. Res. 18, 35 Stat. 571.

Being so authorized, the United States brought this suit as complainant against the Oregon & California Railroad Company, the Southern Pacific Company, Stephen T. Gage (individually and as trustee), the Union Trust Compnay (individually and as trustee), John L. Snyder, and certain others as defendants, to declare forfeited to the United States lands of the Oregon & California Railroad Company aggregating 2,300,000 acres which inured to the predecessors in interest of the company under the acts of Congress referred to in the resolution.

The bill set forth the acts of Congress and alleged that it was expressed that neither the amendatory act of April 10, 1869, nor the act of 1866 should be construed to entitle more than one company to the grant of land, and that following such provision which was in the act of 1869 there was this proviso: "And provided further, That the lands granted by the act aforesaid [act of 1866] shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

That the act of May 4, 1870, also contained the provision (§ 4) that the lands granted thereby, excepting only such as were necessary for depots and other needful uses in operating the road, should "be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre."

The bill also detailed the organization of companies and the steps taken by them to avail themselves of the grants and accomplish the purpose for which they were made; the steps and proceedings in the construction of the roads contemplated; the issue of patents for the lands granted; the amount of land sold and unsold, and wherein

and by what acts there had been breaches of the provisions of the acts above set forth, which were alleged to have been conditions subsequent, and that by such breaches the grants had become forfeited. The bill likewise detailed the various steps and the proceedings whereby the Oregon & California Railroad Company became the owner of the grants, the connection of the defendants, Southern Pacific Company, Gage and the Union Trust Company therewith, and the rights they asserted therein.

It was alleged that each of the other defendants (other than the railroad company, the Southern Pacific Company, Gage and the Union Trust Company) asserted an interest in the lands, created, as they alleged, by actual settlement in good faith upon certain of the unsold lands, not exceeding one quarter section, with intention of making a permanent home thereof, and had applied to the railroad company to purchase the same; that the said defendants had instituted suits against the railroad company, Gage and the Union Trust Company to compel a sale and conveyance of the lands to them; that unless enjoined they would prosecute their suits to final judgments, and that they were hence made parties to this suit in order that they might be so enjoined, and, if the court so order, be permitted to set forth their respective claims for adjudication.

The bill prayed a forfeiture of the unsold lands and that the title of the Government thereto be quieted, or, if such relief be denied, that the lands be adjudged subject to purchase by actual settlers in quantities not exceeding 160 acres to any one purchaser and at a price not exceeding $2.50 per acre; that a receiver be appointed to sell the lands and account for the proceeds "as the court shall direct."

If such relief be denied, that a mandatory injunction issue requiring the railroad company to offer for sale and to sell the lands as required by the grants. And the

bill also prayed that all of the defendants be enjoined from asserting any right, title or interest in and to the lands or committing waste thereon and for an accounting of all moneys received from the sale of lands or timber.

The persons who asserted interests acquired by actual settlement were made parties to this suit and the causes consolidated, and Snyder and others filed cross complaints herein setting up their alleged rights. And there were about 6,000 other persons who by the court were permitted as interveners to present their claims for consideration and adjudication. They are represented in the record by the petition and papers of B. W. Nunnally and others.

The cross complainants alleged that they were actual settlers upon the lands granted by the act of May 4, 1870, long prior to the institution of any suit or the assertion of any claim of forfeiture by the Government; and the petitions in intervention averred that the petitioners were applicants to purchase lands granted by that act or the act of July 25, 1866; and both cross complaints and petitions respectively alleged in substance that the lands were granted in trust to the respective grantee companies for actual settlers or those who should become such, and alleged respectively tender of the purchase price, demand for conveyances and the refusal of the railroad company to accept the tender or make the conveyances. And both cross complainants and interveners asserted a prior right to the extent of the land demanded by them, respectively; denied that the grants had become forfeited, and resisted the relief prayed by the Government. They adopted in all other particulars the allegations of the bill and relied upon them as the basis of their respective claims; prayed that the railroad company be decreed to hold in trust the legal title to the land respectively claimed by them, that their several rights be established and enforced, and that the railroad com-

pany be directed to convey to each of them the tract of land applied for by each, and for general relief.

Demurrers were sustained to the cross complaints and to the petitions in intervention. Demurrers to the bill were overruled. 186 Fed. Rep. 861. Joint and several answers were then filed by the railroad company, the Southern Pacific Company and Gage. The Union Trust Company answered separately. These companies when referred to collectively will be called defendants.

The answers admitted most of the allegations of the bill and denied others; alleged facts in resistance to the construction of the Government of the acts of Congress and to the relief prayed, justified the alleged breaches of the conditions or covenants of the grants, and set up laches, waiver of the breaches, and statutes of limitation.

A great deal of testimony was taken, but the case was practically submitted and a decree entered upon a stipulation of facts made by the Government and defendants. It of itself is quite voluminous, but we deem only certain of its facts material.

By the act of July 25, 1866, *supra* (c. 242, 14 Stat. 239), Congress authorized and empowered the California & Oregon Railroad Company, which had been organized under a statute of the State of California, and such company, organized under the laws of Oregon, as the legislature of that State should designate, to construct and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad in California, as follows: The California & Oregon Company to construct that part of the railroad and telegraph line within the State of California, beginning at a point to be selected by the company on the Central Pacific Railroad in Sacramento Valley, and running thence northerly through the Sacramento and Shasta valleys to the northern boundary of the State. The Oregon company to construct the part in Oregon from Portland south

through certain designated valleys to the southern boundary of Oregon to connect with the part constructed by the first-named company. Whichever company first completed its respective part of the road from the designated terminus to the boundary line between the States was authorized to continue construction until the parts should meet and connect, and the whole line of railroad and telegraph should be completed.

Section 2 of the act granted to the companies, their successors and assigns, "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line."

In case of deficiency in the original sections granted other lands might be selected in lieu thereof. Upon the filing of the survey of the railroad the lands granted were to be withdrawn from public sale so far as located within the limits designated. And it was provided that the lands granted should be applied to the building of the said road within the States, respectively, wherein they were situated; and that the lands reserved by the Government should not be sold except at double the minimum price of public lands, with provisions for sale to actual settlers under the preëmption and the homestead laws.

Section 3 granted to the companies the right of way through the public lands "for the construction of said railroad and telegraph line" 100 feet in width on each side of the road, including grounds for stations, etc., and the right to take from the public lands materials for the construction of the road.

Section 4 provided that when 20 or more consecutive

miles of any portion of the railroad and telegraph line should be ready for the service contemplated, commissioners should be appointed by the President to examine the same, and if it should appear that 20 miles had been completed and equipped in all respects as required by the act, and the commissioners should so report under oath to the President of the United States, patents should issue to the companies or either of them, as the case might be, to the extent of the completed section, and successively as 20 or more miles should be constructed, until the entire railroad and telegraph line authorized by the act should be constructed, and patents to the lands granted should be issued.

Section 5 expressed that the grants were made upon the condition that the companies should keep the railroad and telegraph in repair and use and transport the mails and dispatches for the Government when required to do so by any Department thereof; that the Government should have the preference in the use of the railroad and telegraph at reasonable rates not exceeding those paid by private parties, and that the road should remain a public highway for the use of the Government, free of toll or other charges upon the transportation of the property or troops of the United States, and at the cost and charge of the corporation or companies.

Section 6 required assent to the act to be filed in the Department of the Interior within one year after the passage of the act, and that the first section of 20 miles should be completed within two years and 20 miles in each year thereafter, and the whole on or before July 1, 1875; and the road to be of the same gauge as the Central Pacific Railroad of California and be connected therewith.

Section 7 required the roads to be operated and used as one connected and continuous line and afford to the Government and the public equal advantages and facilities as to rates, time and transportation.

Section 8 provided that for failure to file assent to the act or to complete the road as required the act should be null and void, "and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of such failure, shall revert to the United States." And it was provided if the road and telegraph should not be kept in repair and fit for use the United States might put the same in repair and use and might devote the income of the road and telegraph line to repay all expenditure caused by the default of the companies or either of them, or might fix pecuniary responsibility not exceeding the value of the lands granted.

Section 9 provided that wherever the word "company" or "companies" was used in the act it should be construed to embrace the words "their associates, successors and assigns" the same as if the words had been inserted or thereto annexed.

Sections 10 and 11 are not material to be quoted. And § 12 provided that Congress might, at any time, having due regard for the right of the companies, "add to, alter, amend or repeal" the act.

To avail of the grant, the Oregon Central Railroad Company was incorporated October 6, 1866. It projected its road from Portland to Forest Grove, thence southerly on the westerly side of the Willamette River and became known as the "West Side Company" and its railroad line as the "West Side Line."

The legislature of Oregon, by joint resolution adopted October 10, 1866, designated the Oregon Central as the road to receive the land grant. (There were certain steps in the organization of the Company not important.)

The assent of the company to the act of 1866 was filed in the office of the Secretary of the Interior and subsequently (August 20, 1868) a map of survey of its projected line.

April 22, 1867, certain persons, contending that the

West Side Company had not been lawfully incorporated or organized, and designing to secure the grants and other benefits under the act of 1866, caused proceedings to be taken, intending to organize under the general laws of Oregon the Oregon Central Railroad Company of Salem, and so named in its articles of incorporation. It projected its line of railroad on the easterly side of the Willamette River and became known as the "East Side Company" and its railroad line as the "East Side Line."

In furtherance of its design it procured from the legislature of Oregon on October 20, 1868, the adoption of a joint resolution which declared that the West Side Company was not properly incorporated and was incapable of receiving the grant, and designated the Oregon Central Railroad Company organized at Salem on April 22, 1867, "as the company entitled to receive the lands in Oregon, and the benefits and privileges conferred by the said act of Congress." Oregon Session Laws, 1868.

Controversy arose between the companies as to which was entitled to the benefits of the act of 1866, which controversy continued until about January, 1870.

The controversy was carried to Congress and on April 10, 1869, Congress passed an act which amended § 6 of the act of 1866 so as to allow any railroad company theretofore designated by the legislature of Oregon to file its assent to the act of 1866 within one year from the date of the amending act and providing that nothing therein contained should impair any rights theretofore acquired by any railroad company; but declaring that neither the act of 1866 nor the amending act should be construed to entitle more than one company to a grant of land. "*And provided further, That the lands granted by the act aforesaid* [*act of 1866*] *shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.*"

On June 8, 1869, the East Side Company adopted a resolution which recited the act of July, 1866, its designation by the legislature of Oregon as the company to receive the grant, the passage of the act of April 10, 1869, and concluded as follows: "This company, the Oregon Central Railroad of Salem, Oregon, . . . do hereby accept all the provisions, rights, privileges, and franchises of said act of July 25, 1866, . . . and of all acts amendatory thereof, and upon the conditions therein specified, and do hereby give our assent and the assent of such company thereto."

A certified copy of the resolution was filed in the office of the Secretary of the Interior June 30, 1869, and in the following October a map of survey of location of the first 60 miles of the projected line. On December 24, following, the company completed the first 20 miles within the prescribed time, and the same was examined and approved by commissioners appointed therefor pursuant to the provisions of § 4 of the act of 1866.

March 16, 1870, the Oregon & California Railroad Company was incorporated, and, on March 29, 1870, the East Side Company assigned to it all of its property, including the land grant, with present and future rights under the act of July, 1866, and acts amendatory thereof and supplemental thereto, and by virtue of any act or resolution of the legislature of Oregon, and by the action of its stockholders the East Side Company was dissolved and its stock canceled.

Resolutions were adopted by the Oregon & California Railroad Company accepting the transfer and also a resolution accepting the act of 1866 and amendments thereto, and "all the benefits and emoluments therein or thereof granted, and upon the terms and conditions therein specified," and authorizing its assent to be filed with the Secretary of the Interior and a copy of the deed of assignment from the Oregon Central Railroad Company. This

was done, and since the date of the transfer (March 29, 1870) the Oregon & California Railroad Company has assumed and still assumes itself to be the successor of the East Side Company and of all its rights under the acts of Congress.

The West Side Company abandoned all claims under the act of 1866 and solicited and obtained from Congress, by the act of May 4, 1870, a grant of other lands. The act recited (§ 1) that for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamkill River, near McMinnville, in the State of Oregon, there is granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands, and the right to take materials from the public lands and necessary lands for depots, etc., not exceeding 40 acres at any one place; and also 20 alternate sections per mile of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers, not disposed of or reserved or held by valid preëmption or homestead rights at the time of the passage of the act.

There was the usual provision for selecting other lands in case of deficiency; the survey of the lands along the line of the railroad; the segregation of lands upon the survey and location of 20 or more miles of road; and for the disposition of the lands reserved by the Government within the limits of the grant only to actual settlers at double the minimum price for such lands.

The issuance of patents was provided (§ 3) upon the completion and equipment of 20 mile sections of the railroad.

By § 4 it was enacted "That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations,

side tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre."

It was provided (§ 5) that the Company should, by mortgage or deed of trust to two or more trustees, appropriate and set apart the net proceeds of the lands as a sinking fund, to be kept invested in United States bonds or other safe securities for the purchase from time to time of the first mortgage construction bonds on the road, depots, etc., and that no part of the funds should be applied to any other purpose until all of the bonds should have been purchased or redeemed or canceled.

An assent to the act was required to be filed with the Secretary of the Interior (§ 6) and it was expressed that the grant was upon the condition that 20 miles or more of the road should be completed within two years and the entire road and telegraph line within six years from the date of the act.

In this act Congress, by the words "Oregon Central Railroad Company," referred to the West Side Company.

On July 20, 1870, the West Side Company filed its assent to the act in the office of the Secretary of the Interior.

During the year 1870 the Oregon & California Railroad Company procured, by mortgage bonds, approximately $8,000,000, and during the year 1871 the West Side Company in the same way procured about $1,000,000. With the funds thus procured the lines of railroad contemplated by the act of 1866 and the act of May 4, 1870, respectively, were prosecuted continuously until about January, 1873.

As stated, the East Side Company completed the construction of the first 20 miles of its railroad, and the Oregon & California Railroad Company, after the assignment and transfer to it, as stated, continued construction

in 1870, 1871 and 1872 for a distance of approximately 197 miles; and the West Side Company, with the funds procured by it in 1871, constructed its line under the act of 1870 from Portland to McMinnville, a distance of approximately 47 miles. There was no other construction by the West Side Company, and the lands contiguous to the line of road from Forest Grove to Astoria was forfeited by act of Congress of January 31, 1885.

Financial vicissitudes came to both companies and construction was suspended. It was never resumed by the West Side Company, and the East Side Company, under its new name of Oregon & California Railroad Company, finally became, by the assignment of the West Side Company, the owner of the grants under both acts.

The consideration of the conveyance was the payment of the debts of the West Side Company. Since the date of the conveyance the Oregon & California Railroad Company has assumed and still assumes itself to be the successor of the West Side Company in and to all of the rights, franchises and property granted or intended to be granted by the act of May 4, 1870.

Further financial difficulties impeded the construction of the road and these were met by the various processes detailed in the stipulation of facts, and which we omit except as referred to in the opinion. Among these were a cancellation of the stock of the company and a reissue secured by a trust deed, of which Stephen T. Gage became the only surviving trustee, an issue of bonds, the trust deed to the Union Trust Company, leases to the Southern Pacific Company and the final control by that company through stock ownership of all of the properties and land grants. That company thereafter administered the land grants. These transactions were alleged as breaches of the conditions which, it is contended, were constituted by the provisos in the respective acts given above, providing for the sale of the granted lands to actual settlers.

163,430.28 acres of the granted lands were sold by the Oregon & California Railroad Company prior to May 12, 1887, nearly all of which were sold to actual settlers, in small quantities, although in a few instances the quantities exceeded 160 acres to one purchaser and the prices were slightly in excess of $2.50 an acre. A rapidly increasing demand for the lands in large quantities and at increased prices commenced about 1889 or 1890 and has continued ever since. From 1894 to 1903 some of the granted lands were sold to persons not actual settlers in quantities and at prices exceeding the maximum designated in the provisos, and in several instances in quantities of from 1,000 to 20,000 acres to one purchaser at prices ranging from $5 to $40 an acre—and in one instance a sale of 45,000 acres at $7 an acre to a single purchaser. About 5,306 sales were made, aggregating 820,000 acres, of which sales about 4,930 were for quantities not exceeding 160 acres and 376 sales in quantities exceeding 160 acres to one purchaser, aggregating 524,000 acres. The latter sales were to persons other than actual settlers and for other purposes than settlement and at prices in excess of $2.50 an acre; and approximately 478,000 acres were sold since 1897 and approximately 370,000 of the 524,000 were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser. Approximately three-fourths of all sales made since 1897 were made by contracts providing for the payment of the purchase price in from five to ten annual payments and execution of conveyance upon final payment, a considerable number of which contracts were pending when this suit was brought.

On January 1, 1903, the company withdrew from sale all of its lands and refused to accept offers for any of them, asserting that they were timber lands and unsuitable for settlement. At the time the answer was filed there remained unsold 2,360,492.81 acres, of which 2,075,616.45 acres were theretofore patented under the land grant

acts, and 284,876.36 at that time remained unpatented, all of which are claimed by the company under the land grants.

Since January, 1903, over 4,000 persons have applied to purchase certain of the unsold lands, claiming that they desired to do so for the purpose of settling and establishing homes thereon, and each applicant stated that he was willing and able to tender at the rate of $2.50 per acre therefor. Until about the year 1890 or 1891 there was substantially no demand for the granted lands except for the purpose of settlement, and nearly all of the sales prior to the year 1894 were made for settlement and to settlers.

Prior to 1894 the company maintained an immigration bureau to induce settlement upon the lands, and the greater part of the sales made after that year were to persons not settlers and for prices exceeding $2.50 per acre.

It was testified that the gross amount of lands that inured to the Oregon & California Railroad Company under both the East Side and the West Side grants was 3,182,169.57 acres, and it was stipulated that between the years 1871 and 1906 there were patented under the East Side grant 2,745,786.68 acres and between the years 1895 and 1903 there were patented under the West Side grant 128,618.13 acres, leaving unpatented 307,764.76 acres.

At the time the answer was filed there remained unsold of the granted lands 2,360,492.81 acres, of which 2,075,616.45 acres were theretofore patented to the Oregon & California Railroad Company under the land grants and 284,876.36 thereof at that time remained unpatented, all of which unsold lands are claimed by the railroad company under and by virtue of the grants. The reasonable value of said unsold lands exceed the sum of $30,000,000. There is a table attached to the answer showing the net amount received by the railroad company to be, after

all disbursements, $2,495,094.03. (The bill, as we have seen and shall presently more at length refer to, prays a forfeiture of the unsold lands only.)

Pursuant to the rules and regulations of the Interior Department, all of the patents were issued to and based upon applications in writing therefor from time to time filed in the appropriate land office of the United States by the Oregon & California Railroad Company as the "successor and assign" of the East Side Company and the West Side Company, respectively. Each application was accompanied by an affidavit which alleged, among other things, the following: "The said lands are vacant, unappropriated, are not interdicted mineral, nor reserved lands, and are of the character contemplated by the granting act" under which the patents were applied for.

The stipulation sets out the creation of an Auditor of Railroad Accounts, and subsequently the creation of a Commissioner of Railroads and his duties by various acts of Congress until 1904, when the bureau was terminated and the duties, files and records thereof were transferred to the Secretary of the Interior, and that from 1879 to and including 1903 reports were made of the transactions of the Land Department of the Oregon & California Railroad Company upon blanks furnished by such bureau. The details of the reports are given, which show many sales of the lands in excess of $2.50 per acre.

The bureau, it is stipulated, made annual reports to the Secretary of the Interior which were embodied in his annual reports to the President and by the President forwarded to Congress, where they were referred to appropriate committees and printed as executive documents.

These reports show the administration of the grants by the company, the number of acres received under the grants, the number sold and at what prices, some of which exceeded $2.50 per acre, and that the price asked for lands not sold was in excess of that sum per acre.

Mr. P. F. Dunne, with whom *Mr. Wm. F. Herrin*, *Mr. Wm. D. Fenton*, *Mr. Frank C. Cleary* and *Mr. Joseph H. Call* were on the brief, for appellant railroads.

Mr. John C. Spooner, with whom *Mr. John M. Gearin* was on the brief, for appellant, Union Trust Company.

Mr. John Mills Day, with whom *Mr. M. E. Brewer*, *Mr. Charles E. Shepard* and *Mr. Lewis C. Garrigus* were on the brief, for interveners.

Mr. A. W. Lafferty for cross complainant.

Mr. Constantine J. Smyth, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Davis* and *Mr. Assistant Attorney General Knaebel* were on the brief, for the United States.

Mr. George M. Brown, Attorney General of the State of Oregon, filed a brief as *amicus curiæ*.[1]

After stating the case as above, MR. JUSTICE MCKENNA delivered the opinion of the court.

A direct and simple description of the case would seem to be that it presents for judgment a few provisions in two acts of Congress which neither of themselves nor from the context demand much effort of interpretation or construction. But the case has never been considered as having that simple directness. A bill which occupies 78 pages of the record (exclusive of exhibits), the allegations of which were iterated and reiterated by cross complainants and interveners and added to, and an answer that admitted or

[1] It is not possible to make abstracts of the briefs, as there are more than ten of them containing over 2500 pages. Several hundred authorities are cited.

traversed their averments with equal volume and circumstance, constituted the case for trial. Seventeen volumes of testimony, each of many pages, were deemed necessary to sustain the case as made. It is certain, therefore, that no averment has been omitted from the pleadings; no fact from the testimony that has any bearing on the case; the industry of counsel has neglected no statute or citation, and their ability no comment or reason that can elucidate or persuade. As we proceed it will be seen that we have rejected some contentions. It is not the fault of counsel if we have misunderstood them.

Yet with all the research, it may be on account of it, the contestants have not preserved an exact alignment and have shown no preference as to the company in which contentions are made or opposed.

The Government contends that the provisos, we so designate them and shall so refer to them, though they differ in technical language, constitute conditions subsequent and that by the alleged breaches indicated the lands became forfeited to the United States. The railroad company and other defendants contend that the provisos constitute restrictive and unenforceable covenants. The cross complainants insist that a trust was created for actual settlers and the interveners urge that the trust has the broader scope of including all persons who desire to make actual settlement upon the lands.

This curious situation is presented: The Government joins with the railroad in opposing the contentions of the cross complainants and interveners. Both of the latter unite with the Government in contesting the position of the railroad but join with the railroad against the Government's assertion of forfeiture. The cross complainants attack the claim of the interveners, and the State of Oregon, through its Attorney General, without definitely taking sides in the controversies, declares it to be to the interest of the State and expresses the hope that the lands

now withdrawn by the railroad shall be "subject to settlement and improvement, as contemplated by the provisions of the grant, in order that these vast areas of the State may be improved, but also that the lands may not be withdrawn from taxation, thus depriving the State, and especially the eighteen counties in which they are situated, of a large proportion of their resources from direct taxation." The interest and hope expressed seem like a prayer against the Government's contentions.

There is something more in these opposing contentions than a wrangle or medley of interests, and we are admonished that the words of the provisos, simple and direct as they are of themselves, take on, when they come to be applied, ambiguous and disputable meaning. It may be said at the outset that if ambiguity exists there may be argument in it against some of the contentions.

However, without anticipating, let us consider the provisos, and we repeat them to have them immediately under our eyes. The first is contained in the act of April 10, 1869. That act was expressed to be an amendment of the act of 1866 and to relieve from the effect of the expiration of the time for filing assent to the act of 1866 and to give "such filing of assent, if done within one year from the passage of the" amending act, the same force and effect to all intents and purposes as if it had been filed within one year after the passage of the act of 1866. Then came this proviso, which was preceded by another not necessary to quote: "*And provided further*, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

The act of May 4, 1870, making the grant to the West Side Company, provides in § 4 that the lands granted, excepting only such as are necessary for depots and other needful uses in operating the road, "shall be sold by the

company to actual settlers," the quantities and the price being designated as in the act of 1869.

These, then, are the provisos which are submitted for construction. The contention of the Government is as we have seen, and it lies at the foundation of its assertion of forfeiture of the grant, that they constitute conditions subsequent.

The argument to support the contention is based first on the general considerations that experience had demonstrated to the country the evils of unrestricted grants, and that the bounty of Congress had been perverted into a means of enriching "a few financial adventurers," and that lands granted for national purposes "were disposed of in large blocks to speculators as well as to development companies organized by officers of the railroad companies." Informed by such experience, in substance is the contention, and solicited by petition and moved by the reasoning of some of its members, Congress changed its policy of unqualified bounty, and, while not refusing to contribute to the aid of great enterprises, sought to prevent the perversion of such aid to selfish and personal ends, and to promote the development of the country by the disposition to actual settlers of the lands granted. And, it is insisted, efficient means were adopted to secure the purpose by making the provisos conditions subsequent, with the sanction of forfeiture for violation.

These general considerations are supplemented by a special and technical argument. The provisos and their context, it is said, show the general characteristics of conditions, that is, they make the estate granted and its continuance to depend upon the doing of something by the grantee, and that the proviso in the act of 1869 is expressed in apt and technical words, by the use of which, it is further contended, it is established by authority that an estate upon condition is necessarily created. Cases are cited, and the following is quoted from page 121 of Shep

pard's Touchstone: "That for the most part conditions have conditional words in their frontispiece, and do begin therewith; and that amongst these words there are three words that are most proper, which in and of their own nature and efficacy, without any addition of other words of reëntry in the conclusion of the condition, do make the estate conditional, as *proviso, ita quod*, and *sub conditione*. . . . But there are other words, as *si, si contingat*, and the like, that will make an estate conditional also, but then they must have other words joined with them and added to them in the close of the condition, as that then the grantor shall reënter, or that then the estate shall be void, or the like." And words of such determining effect, it is urged, introduce and give meaning to the proviso in the amendatory act of 1869.

But it will be observed there are no such controlling words in the provision for the sale to actual settlers in the act of May 4, 1870, that is, in the grant to the West Side Company; and the Government is confronted by the rule which it quotes, that in such cases there must be "words of reëntry" or a declaration "that then the estate shall be void, or the like." The Government, therefore, varies and relaxes the rule it invokes and admits that the sense of a law or terms of an instrument may be found in other words than the quoted technical ones if the intention is made clear.

It is not necessary to review the cases cited respectively to sustain and oppose the contending arguments. The principles announced in the cases are rudimentary and may be assumed to be known and the final test of their application to be the intention of the grantor.

These principles will be kept in mind in our consideration of the acts of Congress involved, and, besides, that there may be a difference in rigor between public and private grants and that this court has especially said that railroad land grants have the command and necessarily, therefore, the effect of law.

The Government reinforces its contention, as we have seen, with what it considers a change of policy in legislation and in effect insists that restrictions upon the disposition of the lands granted became more dominant in purpose than the building of the roads, to aid which it was admitted the lands were necessary. The argument is hard to handle, as indeed are all arguments which attempt to assign the exact or relative inducements to conjoint purposes. In the first grants to railroads there were no restrictions upon the disposition of the lands. They were given as aids to enterprises of great magnitude and uncertain success and which might not have succeeded under a restrictive or qualified aid. However, a change of times and conditions brought a change in policy, and while there was a definite and distinct purpose to aid the building of other railroads, there was also the purpose to restrict the sale of the granted lands to actual settlers. These purposes should be kept in mind and in their proper relation and subordination.

We shall be led into error if we conclude that because the railroad is attained it was from the beginning an assured success, and that it was a secondary and not a primary purpose of the acts of Congress. There is much in the argument of the defendants that the aid to the company was part of the national purpose, which this court has said induced the grants to the transcontinental railroads (91 U. S. 79; 99 U. S. 48; *United States* v. *Sanford*, 161 U. S. 412). And we may say that the policy was justified by success. Empire was given a path westward and prosperous commonwealths took the place of a wilderness.

But such success had not been achieved when the grant of 1866 was made nor in full measure when the acts of 1869 and 1870 were passed, and it may be conceded that they were intended to continue and complete such national purpose, and that it was of the first consideration, but the

secondary purpose was regarded and provided for in the provisos under review. Both purposes must be considered. It may be that it was not expected that actual settlers would crowd into "the vast unpeopled territory," but the existence of such settlers at some time must have been contemplated. Both purposes, we repeat, were to be subserved, and how to be subserved is the problem of the case.

There is certainly a first impression against a forfeiture being the solution of the problem or that there was necessity for it. A forfeiture of the grant might have been the destruction of the enterprise, and settlement postponed or made impossible to any useful extent by the inaccessibility of the lands. And forfeiture was besides beset with many practical difficulties as a remedy. When, indeed, would it be incurred? The obligation of the provisos and the remedy for their breach were coincident. The refusal of the demand of the first actual settler (if there could be such without the consent of the railroad) or of the first applicant for settlement would subvert the scheme of the acts of Congress. It cannot be that the grants were intended to be so dependent and precarious and the enterprises so menaced with peril and, it might be, brought to disaster.

Are the contingencies fanciful? Such character may be asserted of any conjecture of what might have occurred but which did not, and yet to construe a statute we must realize its inducements and aims, solving disputes about them by a consideration of what might accomplish or defeat such aims. The acts under review conferred rights as well as imposed obligations, and it could not have been intended that the latter should be so enforced as to defeat the former. We have given an instance of how this might be done by regarding the provisos as conditions subsequent. Another instance may be given. In its argument at bar the Government insisted that it was the duty of

the railroad company to have provided the machinery for settlement and, by optional sales, guarded by probational occupation of the lands, to demonstrate not only initial but the continued good faith of settlers, and that the omission to do so was of itself a breach of the provisos and incurred a forfeiture of the grants. But when did such obligation attach? Before or after the construction of the road—construction in sections or completely? The contention encounters the Government's admission that there was no obligation imposed upon the railroad to sell. And we have the curious situation (which is made something of by cross complainants and interveners in opposition to the Government's contention) of the right of settlers to buy but no obligation on the railroad to sell, and yet a duty of providing for sales under an extreme and drastic penalty. We may repeat the question, Might not such consequences have ended the enterprise, making it and its great purpose subordinate to local settlement? Indeed, might not both have been defeated by the inversion of their purposes.

The omission to institute a plan of settlement and sale is not alleged in the bill as a breach of the provisos. The first breach alleged is the trust deed to Stephen T. Gage, and the next the trust deed to the Union Trust Company. But these deeds manifestly were but forms of security, even if they went too far and were not binding to the extent of their excess. The Government admits that the grants were intended to be used as a basis of credit; and we have argument again against a forfeiture by the dilemma to which the railroad might be brought in its attempt to comply with all the provisions of the act as well as with the provisos. If it failed to complete the road within the time required the granting act was to become "null and void," (upon which we shall presently comment). If it made efforts to complete the road by using the grants as a means of credit it might forfeit them.

But there is a better argument than what may be deduced from the solution of perplexing difficulties or the conjecture of possible contingencies. It will be observed that there was an explicit provision in the act of 1866 that upon the failure of the companies to file assent to the act and to complete the road as and within the time required, the act should "be null and void" and the lands not patented at the time of such failure should "revert to the United States." And it was provided that if the road should not be "kept in repair and fit for use," Congress by legislation might put the same in that condition and repay its expenditures from the road's income or fix pecuniary responsibility upon the company not exceeding the value of the lands granted.

Congress, therefore, had under consideration remedies for violations of the provisions of the act and adjusted them according to what it considered the exigency. As a penalty for not completing the road as prescribed Congress declared only for a reversion of the lands *not then patented;* for not maintaining it in repair and use Congress reserved the right temporarily to sequester the road; and yet for a violation of the provision for sale to settlers it is urged that Congress condemned to forfeiture not only the lands then *unpatented but those patented.* Mark the difference. Was noncompletion of the road of less consequence than settlement along its line?—not necessarily complete settlement but any settlement—the refusal, it might be, of the acceptance of a single offer of settlement or even, as it is contended, of making provision for settlement, being of greater consequence and denounced by more severe penalty than the declared conditions, that is, assent to the act, completion of the road, and its maintenance. This is difficult, if not impossible to believe.

It appears, therefore, that the acts of Congress have no such certainty as to establish forfeiture of the grants as their sanction, nor necessity for it to secure the accom-

plishment of their purposes,—either of the construction of the road or sale to actual settlers—and we think the principle must govern that conditions subsequent are not favored but are always strictly construed, and where there are doubts whether a clause be a covenant or condition the courts will incline against the latter construction; indeed, always construe clauses in deeds as covenants rather than as conditions, if it is possible to do so. 2 Washburn on Real Property, 4. And this because "they are clauses of contingency on the happening of which the estates granted may be defeated." And it is a general principle that a court of equity is reluctant to (some authorities say never will) lend its aid to enforce a forfeiture.

By this conclusion do we leave the provisos meaningless and the Government without remedy for their violation? There is no argument in a negative answer. From the defects of a provision we can deduce nothing nor on account of them substitute one of greater efficacy.

But must the answer be in the negative, and by rejecting the contention of the Government are we compelled to accept that of the railroad company?—or we may say those of the railroad company, for the contentions are many, some of which preclude the application of the provisos, some of which assert their invalidity and others limit their application.

If not first in order, at least in more immediate connection with the contention of the Government is the contention that the provisos are not conditions subsequent but simple covenants, and, it is said, restrictive and negative only, and therefore not enforceable. In support of the contention all of the uncertainties or asserted uncertainties of the provisos are marshaled and amplified. We can only enumerate them. There is uncertainty, it is asserted, in the legal measure of duty, therefore of its performance—for whom to be performed and when; nor is the time or condition of settlement prescribed, whether

by the standard of the homestead or preëmption laws; nor by what test or by what tribunal contests between applicants to purchase are to be determined; no compulsion of sale at any time, to any person, in any quantity; no mutuality in the covenant; no assurance that settlers will apply, and no obligation assumed by them. And the conclusion is deduced that the actual settlers clauses, viewed even as covenants, were either impossible of performance or repugnant to the grants, and, therefore, void.

The arraignment seems very formidable, but is it not entirely artificial? It is stipulated that prior to 1887 more than 163,000 acres of the granted lands were sold, nearly all of which were sold to actual settlers, in small quantities. If the sale of 163,000 acres of land encountered no obstacle in the enumerated uncertainties we cannot be impressed with their power to obstruct the sale of the balance of the lands. The demonstration of the example would seem to need no addition. But passing the example, as it may be contended to have some explanation in the character of the lands so disposed of, the deduction from the asserted uncertainties is met and overcome by the provisos and their explicit direction. They are, it is true, cast in language of limitation and prohibition; the sales are to be made only to certain persons and not exceeding a specified maximum in quantities and prices. If the language may be said not to impose "an affirmative obligation to people the country" it certainly imposes an obligation not to violate the limitations and prohibitions when sales were made, and it is the concession of one of the briefs that the obligation is enforceable, and that, even regarding the covenant as restrictive, the "jurisdiction of a court of equity, upon a breach or threatened breach of the covenant, to enforce performance by enjoining a violation of the covenant cannot be doubted." Apposite cases are cited to sustain the admission, and in answer to the contention of the Government that it could

recover no damages for the breach and hence had no enforceable remedy but forfeiture, it is said: "But the jurisdiction of a court of equity in such cases does not depend upon the showing of damage. Indeed, the very fact that injury is of public character and such that no damage could be calculated, is an added reason for the intervention of equity." And cases are adduced. We concur in the reasoning and give it greater breadth in the case at bar than counsel do. They would confine it, or seem to do so, to the compulsion of sales of land susceptible of actual settlement, and assert that the evidence established that not all of the lands, nor indeed the greater part of them, have such susceptibility. But neither the provisos nor the other parts of the granting acts make a distinction between the lands, and we are unable to do so. The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it. The evil of an attempt is manifest. The grants must be taken as they were given. Assent to them was required and made, and we cannot import a different measure of the requirement and the assent than the language of the act expresses. It is to be remembered the acts are laws as well as grants and must be given the exactness of laws.

If the provisos were ignorantly adopted as they are asserted to have been; if the actual conditions were unknown, as is asserted; if but little of the land was arable, most of it covered with timber and valuable only for timber and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest; if its character was given evidence by the application of the Timber & Stone Act to the reserved lands; if settlers neither crowded before nor crowded after the railroad, nor could do so; if the grants were not as valuable for sale or credit as they were supposed to have been and difficulties beset both uses, the remedy was obvious.

Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law; they were neither cause nor justification for violating it. Besides, we may say that there is controversy about all of the asserted facts and conclusions.

Our conclusions, then, on the contentions of the Government and the railroad company are that the provisos are not conditions subsequent; that they are covenants, and enforceable; and we pass to the other contentions of the company.

It is contended (1) that Congress was without lawful authority on April 10, 1869, to annex a new condition, by amendment or otherwise, to the grant made by the act of 1866 as amended by the act of June 25, 1868 (the latter extended the time to complete the first and subsequent sections of the road and the completion of the whole road). We do not think it is necessary to follow the involutions of the argument by which the contention is attempted to be supported. It is asserted that the California & Oregon Railroad Company filed its assent within one year and completed the first section of twenty miles within two years after the passage of the act of July 25, 1866, and that the Oregon Central Railroad Company (East Side Company) was not in default on April 10, 1869. The assertions come very late. Had they been made at that early time, questions would have been presented whose solution we need not conjecture. The West Side Company preceded the East Side Company and on October 10, 1866, received the designation from the Oregon legislature as the road entitled to receive the grant of 1866. The East Side Company started its existence on April 22, 1867, and in 1868 attacked the legality of the incorporation of the other company and procured the revocation of the designation of that company and the designation of itself by the legislature. The controversy for precedence and rights continued. It was carried to Congress, and the

act of April 10, 1869, was passed. Subsequently came compromises and the act of May 4, 1870. By the latter act and in acceptance of its grant and provisions, the West Side Company took the west side of the Willamette River. The East Side Company took the east side of the river and on June 8, 1869, by resolution, accepted the provisions of the act of 1866 "and of all acts amendatory thereof, and upon conditions therein specified, and do hereby give our assent and the assent of such company thereto." It was not then thought, as it is now asserted, that the act of 1869 annexed new and invalid conditions, nor was there such assertion afterwards. The East Side Company, on March 29, 1870, assigned its rights under the act of 1866 *and the acts amendatory thereof and supplemental thereto* to the present company, the Oregon & California Railroad Company, and then dissolved. The Oregon & California Railroad Company accepted the transfer and by resolution accepted the act of 1866 and amendments thereto and "all the benefits and emoluments therein and thereof granted, and upon the terms and conditions therein specified," and authorized the assent to be filed in the office of the Secretary of the Interior.

It is too late to declare such formal and repeated action to have been unnecessary. Every advantage was obtained, and while enjoying the benefit of it the obligations of it cannot be denied. Had there been an assertion of rights against the act of 1869 and had there been an immediate rejection of its provisions and obligations, the questions in the present case would not now be submitted for solution. It is possible to suppose that no patents to lands would have been issued, or at any rate the Government's attention would have been challenged to the assertion of rights which it might have contested from a position of supreme advantage.

(2) It is contended that if sales were made under the

limitations of the provisos the breaches were acquiesced in, and for this the action and knowledge of the officers of the Government are adduced—indeed, the knowledge of Congress itself; and reciting what was done under the grants, counsel say: "It is a story of mortgages and sales, executory contracts and conveyances, and a stream of Government patents flowing in between. These things were known of all; they were matters of common knowledge, notoriety, of public record; the railroad knew them; the people knew them, the Government knew them." And cases are cited which, it is contended, establish that such circumstances might work an estoppel even against the Government, which, when it appears in court, it is contended, is bound like other suitors, and certainly establish that for more than forty years in the view of the executive officers the provisos were not conditions subsequent. Granting their strength in that regard, granting they have some strength in every regard, they have not controlling force, considering the provisos as simple covenants. And they cannot be asserted as an estoppel. No one was deceived, at least no one should have been deceived; no action was or should have been induced by them that could plead ignorance of the provisions and immunity from their responsibility. The recited conduct had explanation and notice in the opinions of the Department of the Interior. They are entirely consistent with the belief expressed by Mr. Ballinger, then Commissioner, afterwards Secretary of the Interior, that their enforcement was a matter for the courts, not for executive or legislative action.

Mr. Ballinger, in a communication to a member of the House of Representatives, expressed the view that "as soon as the title vested in the company [and it was his view that it had vested by the construction of the railroad], jurisdiction over the lands passed from the executive branch of the Government, and the enforcement of the

provision [the sale of lands to actual settlers] rests with the courts, through appropriate action by either the settlers entitled to purchase or by the Government, acting through the Department of Justice." And a doubt was expressed of the power of Congress to compel compliance with the provision. This was the position of the Department in 1907. It was not new or sudden. It was the repetition of the declaration of a much earlier time.

In an early day of the grant—1872—a communication was addressed by the then Attorney General to the Commissioner of the Land Office, accompanied by a letter from the president of the European & Oregon Land Company (this company was made a trustee of the lands granted under the acts of 1866 and 1869 to secure a bond issue of the company), in which it was stated that the board of trustees of the company, in accordance with a legal opinion given to it, had ordered that persons who had become *actual settlers* between July 25, 1866, and April 10, 1869, should have the privilege of purchasing according to the proviso, "but as to *all others* the company was not legally restricted from selling on liberal terms, for cash or credit, at reasonable rates." A request was made for an approval of the construction, and that the company be authorized "to sell on such terms as may be reasonable and just to all parties without any restrictions." This letter was submitted to the then Secretary of the Interior Mr. Delano, who replied "that the proviso *means just what it says*," "'that the lands be sold to actual settlers only'" in the designated quantities and for the designated prices; that the legislative intention was plainly to prevent the lands being held for speculative prices or disposed of to others than actual settlers, and that to construe the proviso as requested would in his "judgment utterly defeat such intention."

It being objected that the case was not submitted for decision or opinion, the Secretary replied that it was so

regarded and that the opinion could not be formally withdrawn. He, however, expressed his willingness at any time on application to reopen the case and to hear all arguments which the company might desire to present. The opportunity was never taken advantage of, but the company proceeded upon its own construction of the proviso.

These views explain the attitude of the Department and give different color and meaning to its action than those assigned to it by the railroad company, and if the company disagreed with or defied the Department it cannot claim to have been deceived. The views of the Department were no doubt the views of Congress, and its action and reluctance to prejudge are exhibited in the resolution of April 30, 1908, under which this suit was brought. It refused, as we have seen, to determine peremptorily the rights of the United States or to anticipate judicial action.

We may observe again that the acts of Congress are laws as well as grants and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence and estoppel and even to the defenses of laches and the statute of limitations. The laws which are urged as giving such defenses and as taking away or modifying the remedies under review have no application. It would extend this opinion too much to enter upon their discussion.

A word of comment may be made upon one of the acts adduced as constituting a waiver of the breaches of the covenants, that is, upon the act passed August 20, 1912 (c. 311, 37 Stat. 320), it being supplemental to the joint resolution of April 30, 1908, *supra*. It was passed after this suit was commenced and brought forward with the other acts by an amendment to the answer. Counsel as-

sert of it substantially as alleged in the answer that it "is a recognition of the non-settlement character of the lands involved, and that such lands, at the time they were sold to the so-called innocent purchasers described in forty-five suits brought by the United States against said purchasers and these defendants in this court, are unfit for settlement and were so unfit for settlement and could not be sold to actual settlers at the time they were sold by the company to such purchasers."

We have answered the contention so far as it depends upon the character of the lands. The character of the lands furnished no excuse. It might have justified non-action, but it did not justify antagonistic action. Moreover the act, while it authorized compromises with purchasers from the company, explicitly excluded the application of the provision to lands in the present suit and declared that it should create no "rights or privileges whatever in favor of any of the defendants therein" and that nothing in the act should condone any of the breaches of the conditions or provisions of the granting acts nor be a waiver of any cause of action or remedy of the United States on account of any such breach or breaches or of any right or remedy existing in favor of the United States.[1]

With the provisos as conditions subsequent out of the way, the suit remains one to enforce a continuing covenant. It is not a suit to vacate and annul patents.

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[1] "SEC. 6. That nothing in this act contained, nor action taken pursuant to the provisions of this Act, shall be construed as a condonation of any of the breaches of any of the conditions or provisions annexed to any of the grants designated in said joint resolution approved April thirtieth, nineteen hundred and eight, nor as a waiver of any of said conditions or provisions, nor as a waiver of any right of forfeiture in favor of the United States on account of any breach or breaches of any of said conditions, nor as a waiver of any cause of action or remedy of the United States on account of any breach or breaches of any said conditions or provisions, nor as a waiver of any other rights or remedies existing in favor of the United States."

(3) There is a special contention, given the pretension of a separate brief, that the "Sinking Fund Act of Congress of May 7, 1878, ratified the transfer of the California & Oregon Railroad and its land in California to the Central Pacific Company, and operated to abrogate the 'Settlers Clause' contained in the acts of April 10, 1869, and May 4, 1870." The argument to support the contention is that the Central Pacific Railroad Company became, with the consent of Congress, the owner of the California & Oregon Railroad (to avoid confusion this company must be kept distinct from the defendant Oregon & California Railroad) in 1870, and that after such transfer and date it became impossible for the latter company to sell the lands for the prescribed price, or for any other price, or to settlers in any quantities, "for the reason that the company had parted with its title to the entire grant, and this was recognized, approved and validated by the United States." The contention seems to be directed more to the settlers' clause viewed as a condition subsequent than to it considered as a covenant. It is, however, said that the clause "has been entirely abrogated by said legislation and the acts of the Government." We are not impressed by the contention. It seems to be a tardy claim in the case and is the dare of an extreme ingenuity against the admissions and averments of the answers and many assertions which the record contains of ownership of and dominion over the lands by the Oregon and California Company and of their disposition by it. Indeed, it is opposed to the whole scheme of the suit and the defenses to it and to the stipulation of the parties. It there appears that after the designated date patents were applied for and issued to the Oregon & California Railroad Company, defendant herein, for 323,078.68 acres of land, over 163,000 acres of which were sold by that company to actual settlers. Indeed, all of the activities in the administration of the grants were those of the Oregon & California

Railroad. It made contracts and executed deeds for particular parcels; it made trust deeds for the whole of them; it went into receivership and emerged from it to resume its activities, and made the reports to Congress upon which it bases the acquiescence of the Government in the breaches of the provisos.

It is true that there appears in the stipulation the confusion of a statement that there was an amalgamation and consolidation of the Central Pacific, Western Pacific and Oregon Central Railroad Companies into the Central Pacific Company and that at the time the articles of amalgamation and consolidation were filed (June 23, 1870) the California & Oregon Railroad Company "was the owner of all unsold lands in California" granted by the act of July 25, 1866; that from the date of filing such articles of amalgamation and consolidation the Central Pacific Railroad Company remained owner of all of the lands granted by the act of 1866 and two other acts which made grants to the latter company until 1899, when what remained unsold of the lands were granted to the Central Pacific Railway. But it is stipulated that the statements "concerning the ownership and conveyance of the lands granted by said acts of Congress are made subject to the terms and provisions of said acts of Congress respectively, and all rights of the United States thereunder—the title to said lands not being an issue in the suit at bar." Why these facts were stipulated it is hard to guess, but it is certain they cannot be given effect against all other facts stipulated. It will be observed the stipulation is concerned only with the California & Oregon Railroad, not with the defendant Oregon & California Railroad. The explanation of the Government is, therefore, correct that the Oregon part of the grant was by the grant itself treated as substantially distinct from the California part and that the Oregon part has always been claimed, used and enjoyed by defendant, the Oregon &

California Railroad Company or its predecessors in title, and never by the Central Pacific.

The provisos of the acts having been thus established as covenants, not conditions subsequent, between the Government and the defendants, and their continuing obligation determined, we are brought to the consideration of the rights of the cross complainants and interveners thereunder.

It may be said that in some of the aspects of our discussion there was implication against their contentions, but it also may be said there is implication for them. Undoubtedly the provisos expressed the policy of the settlement of the lands and a sale to settlers, but the cross complainants and interveners assert a right more definite—a trust, indeed, and personal—of compulsory obligation upon the railroad company, to be enforced in individual suits.

Snyder and 63 others, alleging themselves to be *actual* settlers upon specified lands, brought suits nearly a year before the present suit was commenced. They were brought into this suit and are now here as cross complainants. They pray that the grants be declared to be grants in trust and ask for protection, "whatever form of decree may be entered." They further ask "that receivers or trustees be appointed, whose duty it shall be to formulate, with the approval of the District Court, suitable rules and regulations for the sale of all the lands here involved, in accordance with the acts of Congress making the grants." They deny having anything in common with the interveners, and, as we have seen, vigorously attack the claim of the Government for a forfeiture of the grants.

The interveners concur with the cross complainants that the acts created a trust but assert that they have a broader extent. In other words, and as their counsel express it, the intention of Congress was to create a trust

in the granted lands for the benefit of those who might desire to acquire title thereto, that is, not actual settlement was the condition of purchase, but an intention to settle, with the qualification to do so.

Here, then, is a conflict between the asserted beneficiaries of the asserted trust—whether *actual* settlers, as cross complainants contend, or *applicants* for settlement, as the interveners insist. The distinction would seem to be real and cannot be confounded. The word "actual" expresses a settlement completed, not simply contemplated or possible. Upon the express words of the provisos it would seem that interveners' claims to be beneficiaries of the trust—if there is a trust, must be refuted.

The cross complainants present arguments of more difficulty, supported by appealing considerations. "Actual settlers" are the words of the provisos, and we may assume actual settlers were contemplated and sales of the lands were restricted to them; but how were actual settlers to be ascertained, and by whom? And was there a compulsion or option as to sales? There could not be an absolute right to settle or purchase unless there was an absolute compulsion to sell. The acts of Congress omit regulation. Their language is not directive; it is restrictive only. With this exception the grant is unqualified. The lands were granted to aid in the construction of the road and while it is a certain inference that disposition of them was contemplated, necessarily there was conferred a discretion as to time. There was certainly no limitation of it expressed.

The contending considerations we have already stated and their respective weights, and decision must necessarily turn upon a judgment of the purposes of the granting acts, and in what manner they were intended to be accomplished, not of the provisos alone. There is plausibility in the argument which represents that if the pro-

visos be held to give to the railroad a discretion of sale, the choice of time and settlers, their requirement is impotent, and instead of securing settlement would prevent it; instead of devoting the lands to development, retain them in monopoly and a kind of mortmain.

We feel the strength of the argument but cannot yield to it. There are countervailing ones. We have already indicated that nothing can be deduced from the imperfections of the granting acts. Indeed, the argument of cross complainants, like a great many other contentions in the case get their plausibility from the abuses of the granting acts, not their uses. We have seen that in the early days of the grants settlements were normally made and the railroad, in the exercise of its discretion, responded to such settlement by sales to settlers.

There was no embarrassment then in the selection of settlers and no question by anybody that there was a discretion of sale on the part of the railroad company. A denial came later and the assertion of a peremptory right against the company of settlement and purchase, both to be acquired by an intrusion upon the company's possession, if it can be said to have had possession. Of course, the delay in the assertion of a right is not conclusive against its existence. There is, however, argument in it, and if it may be said that settlers were not in such numbers and urgency as to bring their rights to attention and assertion, a conjecture may be engendered that some other purpose than the acquisition of homes has led to a denial of rights which no one theretofore had questioned. It is asserted that not a desire of settlement but the rise in the price of lumber has created an eager demand for the lands.

There are, however, further considerations. By the acts of 1866 and 1870 it is provided that upon the survey and location of the roads the Government shall withdraw from sale the granted lands; and the provision would

seem to withdraw the lands from the specific operation of the land laws and certainly from a complete analogy to them. The public land laws had test of the qualification of settlers under them; they had also the machinery of proof and precaution. When the granted lands were withdrawn from those laws and primarily devoted to another purpose they were committed to another power, to be administered for such purpose, and a discretion in the exercise of the power, within the restriction imposed, was necessarily conferred. This purpose we have sufficiently estimated. Nor need we pause to consider the differences between charitable trusts and other trusts, the class, not individual interest, which the former must have, as it is contended, and the certainty in the beneficiaries which the cases have assigned to the latter. And certainly the words "actual settlers" indicate no particular individuals. They describe a class or body of individuals without habitation or name. As Judge Wolverton, in his opinion in the District Court (186 Fed. Rep. 861, 910), said: "There could be no actual settler until an actual habitation was established upon some specific parcel of this land. Logically, no one is a *cestui que trust* under the theory until and unless he becomes such a settler. This is a palpable demonstration of the uncertainty as to the beneficiary, for who, of the vast concourse of humanity, is going to come and claim the right and privilege of settling upon the land?" We cannot construe the grants as confined or encumbered by rights so indefinite.

There was a complete and absolute grant to the railroad company with power to sell, limited only as prescribed, and we agree with the Government that the company "might choose the actual settler; might sell for any price not exceeding $2.50 an acre; might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres." And we add, it might choose

the time for selling or its use of the grants as a means of credit, subject ultimately to the restrictions imposed; and we say "restrictions imposed" to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos.

To use the grant for credit might become, indeed did become, a necessity. The construction of the road halted for funds. They were raised by trust deeds, as we have seen. The accomplishment of the purpose of the grants determines, we repeat, against the creation of a trust.

In conclusion we cannot refrain from repeating that the case in its main principles is not in great compass. It has been given pretension and complexity by the happening of the unforeseen, the lapse of time, change of conditions and the contests of interests. These, however, are but accidents, giving perplexity and prolixity to discussion. Judgment is independent of them. It is determined by the simple words of the acts of Congress, not only regarded as grants but as laws and accepted as both; granting rights but imposing obligations—rights quite definite, obligations as much so. The first had the means of acquisition; the second, of performance; and, as we have pointed out, whatever the difficulties of performance, relief could have been applied for and, it might be, have been secured through an appeal to Congress. Certainly evasion of the laws or the defiance of them should not have been resorted to.

Nor can their obligation be magnified by looking backwards, by the results achieved rather than when they were only hoped for, by conditions of which there was not even prophecy.

We have seen that one company failed under the burdens which it assumed. The other company took it up and struggled for years under it and its own burden. It may, indeed, have finally succeeded by a disregard of

the provisos. It might, however, have succeeded by a strict observance of them. We are not required to decide between the suppositions. We can only enforce the provisos as written, not relieve from them.

For the same reason we cannot at the instance of the Government give a greater sanction to them than Congress intended, nor give to cross complainants and interveners a right which the granting acts did not confer upon them.

Rejecting, then, the contention of the Government and the contentions of the cross complainants and interveners and regarding the settlers clauses as enforceable covenants, what shall be the judgment? A reversal of the decree of the District Court, of course, and clearly an injunction against further violations of the covenants. There certainly should be no repetition of them. What they were the record exhibits.

We need not comment on them or point out how opposed they were to the covenants, how antagonistic to the policy and purpose of the Government expressed in the covenants. The contrast of a sale to a single purchaser of 160 acres (the maximum amount) with a sale of 1000, 2000, 20,000 and 45,000 acres to a single purchaser needs no emphasis; nor the contrast of a use of the lands to establish homes with their use for immediate or speculative enterprises.

In view of such disregard of the covenants, and gain of illegal emolument, and in view of the Government's interest in the exact observance of them, it might seem that restriction upon the future conduct of the railroad company and its various agencies is imperfect relief; but the Government has not asked for more.

In its bill it has distinguished between the sold and unsold lands and between the respective rights and interest, vested, contingent or expectant, in them; and while it is asserted that all have become forfeited, only the unsold

lands and the rights and interest in them are included in this suit. And the reason is given that the purchasers were many, the names and places of residence of only a few of them were known and the names of the others could not have been ascertained in time to make them parties to the suit. Besides, that such purchases and interests were made and acquired under greatly varying circumstances and that it would be inequitable to make a few purchasers representatives of all, and to make all parties would postpone and might ultimately defeat the public interests. That, therefore, this suit was brought, it is alleged, to determine the rights and remedies as to the unsold lands and that subsequently other suits will be instituted as to the sold lands, rights and remedies as to them being in effect reserved.

Therefore, the decree in this suit shall be without prejudice to any other suits, rights or remedies which the Government may have by law or under the joint resolution of April 30, 1908 (Res. 18, 35 Stat. 571), or under the act of Congress passed August 20, 1912 (c. 311, 37 Stat. 320).

However, an injunction simply against future violations of the covenants, or, to put it another way, simply mandatory of their requirements, will not afford the measure of relief to which the facts of the case entitle the Government.

The Government alleged in its bill that more than 1000 persons had made application to purchase from the railroad company in conformity to the covenants. In answering the defendants averred that such applications were made by persons who desired to obtain title on account of the timber and not otherwise, and for the purpose of speculation only and not in good faith as actual settlers. And it was averred that the lands were chiefly and in most instances solely of value because of the timber thereon and were not fit for actual settlement. And, further, that the lands capable of actual settlement and the establishment of

homes thereon at no time "exceeded (approximately) 300,000 acres, consisting of small and widely separated tracts, all of which were sold to actual settlers or persons claiming to be such during construction and prior to completion, respectively, of said railroads, in quantities of 160 acres or less to a single purchaser, at prices not exceeding $2.50 per acre."

A great deal of testimony was introduced, consisting not only of that of witnesses but of maps, photographs, reports and publications, which tended to establish the asserted character of the lands. And there was evidence in rebuttal. We cannot pause to determine the relative probative force of the opposing testimonies. It is, however, clear, even from the Government's summary of the evidence, that lands which may be fit for cultivation have a greater value on account of the timber which is upon them. Besides, for our present purpose we may accept the assertion of defendants; and we have seen that Congress extended the Timber and Stone Act to the reserved lands, and, by the act of August 20, 1912, *supra*, it has withdrawn from entry or the initiation of any right whatever under any of the public land laws of the United States the lands which might revert to the United States by reason of this suit.

This, then, being the situation resulting from conditions now existing, incident, it may be, to the prolonged disregard of the covenants by the railroad company, the lands invite now more to speculation than to settlement, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever or of the timber thereon and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances

and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.

If Congress does not make such provision the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the court in its discretion may modify the decree accordingly.

Decree reversed and cause remanded to the District Court for further proceedings in accordance with this opinion.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of the case.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY *v.* YURKONIS.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 852. Submitted May 3, 1915.—Decided June 21, 1915.

Plaintiff sued railroad company for personal injuries in the state court and defendant removed the case to the Federal court on ground of diverse citizenship; more than two years after the cause of action arose plaintiff amended his complaint setting up that he was engaged in mining coal to be sent out of the State and that he could recover under the Federal Employers' Liability Act; on the trial defendant moved to dismiss on the ground that under that act the two year statute applied and plaintiff thereupon moved to amend by striking out allegations as to interstate commerce which the court denied and the case was submitted to the jury on the issues joined under the common law and the state statute. There was a verdict for the

plaintiff, and the judgment was affirmed by the Circuit Court of Appeals. On writ of error from this court to review the judgment *held* that:

In order for this court to review the judgment of the Circuit Court of Appeals, jurisdiction in the District Court must have rested, not on diverse citizenship alone, but must also in part have arisen because of averments in the complaint showing a cause of action under the Constitution or laws of the United States involving a substantial controversy.

In the absence of such averments in the complaint the judgment of the Circuit Court of Appeals is final.

The fact that coal may be used in interstate commerce after being mined and transported does not make an injury sustained by the miner an injury sustained while engaged in interstate commerce, or create a cause of action under the Federal Employers' Liability Act.

Where this court cannot review the judgment of the Circuit Court of Appeals because the jurisdiction of the Federal court rests on diverse citizenship alone, it cannot pass on other questions, such as whether the plaintiff had not prior to commencement of the action removed to, and become a citizen of, defendant's State.

Writ of error to review 220 Fed. Rep. 429, dismissed.

THE facts, which involve the jurisdiction of this court to review the judgments of the state court under § 237, Judicial Code, are stated in the opinion.

Mr. George C. Holt, *Mr. John Vernon Bouvier, Jr.*, and *Mr. Wm. Montague Geer, Jr.*, for defendant in error in support of the motion.

Mr. William S. Jenney, *Mr. Everett Warren* and *Mr. F. W. Thomson* for plaintiff in error in opposition to the motion:

The writ of error should not be dismissed.

The judgment below should not be affirmed on motion. The writ of error was sued out in good faith and the grounds asserted in support of it are not frivolous. The questions raised are serious, important and far-reaching.

They are worthy of the best efforts of counsel and the closest consideration of the court.

While plaintiff in error desires a quick determination of the questions raised by the assignment of errors, it protests earnestly against any action by way of the summary docket and an immediate hearing.

Under the limitations imposed by this court upon its review of the record in relation to the questions of negligence and contributory negligence, it will be found that the defendant in error failed to show that his injuries were due to the negligence of his employer.

In support of these contentions see *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Atch., T. & S. F. Ry.* v. *Robinson*, 233 U. S. 173; *Bankers Co.* v. *Minneapolis &c. R. R.*, 192 U. S. 371; *Colorado &c. Co.* v. *Turck*, 150 U. S. 138; *Empire Mining Co.* v. *Hanley*, 198 U. S. 292; *Ex parte Jones*, 164 U. S. 691; *Firth* v. *Firth*, 50 N. J. Eq. 137; *Florida &c. R. R.* v. *Bell*, 176 U. S. 321; *Gibson* v. *Bruce*, 108 U. S. 561; *Henningsen* v. *U. S. Fidelity Co.*, 208 U. S. 404; *Hislop* v. *Taffe*, 141 App. Div. 40; *Hoes* v. *N. Y., N. H. & H. R. R.*, 173 N. Y. 435; *Howard* v. *United States*, 184 U. S. 676; *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290; *Hull* v. *Burr*, 234 U. S. 712; *Mansfield, C. & L. M. R. R.* v. *Swan*, 111 U. S. 379; *Missouri, K. & T. R. R.* v. *Wulf*, 226 U. S. 570; *Montana Mining Co.* v. *St. Louis Mining Co.*, 204 U. S. 204; *Nor. Pac. R. R.* v. *Soderberg*, 188 U. S. 526; *Parker* v. *Ormsby*, 141 U. S. 81; *Penfield* v. *C., O. & S. R. R.*, 134 U. S. 351; *Perez* v. *Fernandez*, 202 U. S. 80; *Pope* v. *Louisville &c. Co.*, 173 U. S. 573; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105; *Railroad Commission of Ohio* v. *Railroad Co.*, 225 U. S. 101; *Seaboard Air Line* v. *Horton*, 233 U. S. 492; *Spencer* v. *Silk*, 91 U. S. 526; *Third Street Co.* v. *Lewis*, 173 U. S. 457; *Thompson* v. *Cent. Ohio R. R.*, 6 Wall. 134; *Warner* v. *Searle Co.*, 191 U. S. 195; *Weir* v. *Rountree*, 216 U. S. 602; *West. Un. Tel. Co.* v. *Ann Arbor R. R.*, 178 U. S. 239.

MR. JUSTICE DAY delivered the opinion of the court.

This case was brought in the Supreme Court of New York to recover damages for injuries sustained by the plaintiff while in the employ of the defendant Railroad Company. The complaint charged that the injuries were received while the plaintiff was employed in the defendant's colliery in Luzerne County, Pennsylvania. As to the manner of injury the complaint averred that while the plaintiff was in the employ of the defendant in its colliery, and was engaged in and about the performance of his duties, preparing and setting off a charge of dynamite for the purpose of blasting coal, the explosive gases which accumulated at the place where plaintiff was working suddenly ignited and exploded, causing a squib attached to the charge of dynamite to catch fire and to be immediately consumed, so that the charge of dynamite was exploded and discharged, and as a result thereof the plaintiff received great, severe and permanent injuries.

The complaint also charged the carelessness and negligence of the defendant in failing to provide and keep a safe place for the plaintiff to work, and certain other acts unnecessary to be repeated but alleged to be of a negligent character. The complaint also charged a violation of the law of the State of Pennsylvania, providing for the health and safety of persons employed in or about the coal mines of that State. Upon the petition of the Railroad Company the case was removed to the District Court of the United States for the Eastern District of New York, where trial was had and judgment rendered in favor of the plaintiff.

The petition for removal alleged that the plaintiff, at the beginning of the suit and since resided in Richmond County, New York, and was at the time of the beginning of the action and still was an alien and citizen of a foreign country, and that the defendant Railroad Company was a corporation organized and existing under the laws of the

State of Pennsylvania. After the removal of the case to the United States District Court, the defendant filed an answer, taking issue upon the allegations of the complaint. Five months after the removal, the plaintiff filed an amended complaint, which contained the same allegations as to the manner of the injury, and allegations as to the common law and statutory liability of the defendant. The amended complaint added certain allegations wherein it was alleged that the defendant, for the purpose of its railroad, owned, managed and operated a certain mine or colliery known as the "Pettibone" colliery in the State of Pennsylvania, in which plaintiff was employed at the time of the injury, and where at all of the times covered by the complaint the defendant did and still does mine and prepare anthracite coal for use in its locomotives and engines and other equipment used in its business as a common carrier in interstate commerce. That at the time of receiving the injury plaintiff was employed by the defendant at said mine or colliery in such interstate commerce. The amended complaint did not change the allegations as to the manner in which plaintiff received his injuries. The defendant took issue upon the amended complaint and the case came on for trial. In the course of the trial, during examination of a witness, while evidence was being offered to show the disposition of the coal mined, counsel for defendant stated that it used the coal mined in its locomotives in interstate commerce. He said that as a matter of fact and as a matter of law coal which plaintiff mined was used in that way, and that "we are engaged in interstate commerce." At the close of the evidence the defendant moved for the direction of a verdict upon the ground that the evidence had established liability under the Federal Employers' Liability Act, and that as the amended complaint had been served more than two years after the injuries occurred, the action was barred by the statute of limitations. Thereupon plaintiff's counsel moved to

amend the amended complaint by striking out the allegations relating to interstate commerce. The court denied this motion and submitted the case to the jury, upon the issues joined under the common law and Pennsylvania statute. The Circuit Court of Appeals held that the trial court should have granted this motion, but that the case was devoid of any showing that the Federal Employers' Act applied under the circumstances, and that, had it applied, it would have been the controlling law of the case, and the court affirmed the judgment of the District Court.

There is a motion to dismiss for want of jurisdiction of this court to review the judgment of the Circuit Court of Appeals. It is well settled that in order to review the judgment of the Circuit Court of Appeals jurisdiction in the District Court must not have rested upon diverse citizenship alone, but that jurisdiction must in part at least have arisen because of averments showing a cause of action under the Constitution or laws of the United States, and in order to come to this court by writ of error to the Circuit Court of Appeals such allegations of Federal right must be found in the complaint. *McFadden* v. *United States*, 210 U. S. 436. The allegations in that respect must show as a basis of action a substantial controversy respecting the Constitution or laws of the United States. *Hull* v. *Burr*, 234 U. S. 713. In the absence of such allegations in the complaint the jurisdiction of the Circuit Court of Appeals is final. *Roman Catholic Church &c.* v. *Pennsylvania Railroad Co.*, 237 U. S. 575, and *Merriam* v. *Syndicate Publishing Company*, 237 U. S. 619, both decided June 1, 1915.

The averments of the complaint as to the manner of the receiving of the injury by plaintiff showed conclusively that it did not occur in interstate commerce. The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was

mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce, facts essential to recovery under the Employers' Liability Act.

It therefore follows that the jurisdiction of the Court of Appeals in this case was final. The plaintiff in error insists that the Court of Appeals should have reversed the case and remanded it to the District Court with instructions to remand the case to the state court for want of jurisdiction in the Federal court, and this because in the course of the testimony the plaintiff said that he had been a citizen of the United States some years before the action was begun, and the defendant alleges that the record shows, notwithstanding the allegations in its petition for removal, that plaintiff did not remove to New York from Pennsylvania until after the suit was brought, the result being that, if there was no foundation for the suit under a Federal statute, the want of diverse citizenship ousted the jurisdiction of the District Court. Without expressing any opinion as to what the Circuit Court of Appeals should have done, we are not concerned with its action unless we have jurisdiction to review the judgment of that court, which we do not have for the reasons already stated.

Dismissed for want of jurisdiction.

PRICE *v.* PEOPLE OF THE STATE OF ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 274. Argued May 12, 1915.—Decided June 21, 1915.

This court accepts the decision of the highest court of the State as to the construction of a pure food statute and whether specified articles are included within the prohibitions thereof, and then determines whether, as so construed, the statute is valid under the Federal Constitution.

The police power of the State extends to imposing restrictions having reasonable relation to preserving the health of its people.

The nature and extent of such restrictions are matters for legislative judgment in defining the policy of the State, and are within the power of the State unless palpably unreasonable and arbitrary.

A prohibition against the sale of food preservatives containing boric acid is not so unreasonable and arbitrary as to amount to deprivation of property without due process of law.

It is not enough to condemn a police statute as unconstitutional under the due process clause that the innocuousness of the prohibited article be debatable; for if debatable the legislature is entitled to its own judgment.

In enacting a police statute the legislature is not limited to general directions, but may prohibit the sale of such specific articles as it deems injurious.

The legislature may estimate degrees of evil and adjust its legislation according to the existing exigency; and, without offending the equal protection provision of the Constitution, may prohibit the sale of particular articles—such as food preservatives containing boric acid—if it does not exceed bounds of reasonable classification.

This court will not assume that goods are shipped from State to State in small retail packages, and where the character of the shipment is not shown, such packages cannot be classed with the "original packages" within the rule protecting such packages from subjection to the police laws of the State.

In this case no question of the conflict of the state law with action by Congress in regard to interstate shipment of food is involved.

The provisions of the Pure Food Law of Illinois of 1907 prohibiting sale of food preservatives containing boric acid are not unconstitu-

tional under the due process or equal protection clauses of the Fourteenth Amendment, or as to the sales within that State of the articles involved in this action in the packages in which they were sold, under the Commerce Clause of the Federal Constitution.

257 Illinois, 587, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of the Pure Food Statute of Illinois of 1907, are stated in the opinion.

Mr. Trafford N. Jayne for plaintiff in error.

Mr. Lester H. Strawn, Assistant Attorney General of the State of Illinois, with whom *Mr. Patrick J. Lucey*, Attorney General of the State of Illinois, was on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to review a judgment of the Supreme Court of Illinois, which affirmed a judgment of the Municipal Court of Chicago, finding the plaintiff in error guilty of a violation of the 'Pure Food' statute of that State and imposing a fine. 257 Illinois, 587.

The violation consisted of a sale in Chicago of a preservative compound known as 'Mrs. Price's Canning Compound' alleged to be intended as a 'preservative of food' and to be 'unwholesome and injurious in that it contained boric acid.'

The statute (Laws of Illinois, 1907, p. 543, §§ 8 and 22, Ch. 127b; Hurd's Rev. Statutes, 2209, 2213, 2218) provides:

"§ 8. DEFINES ADULTERATION.] That for the purpose of this act an article shall be deemed to be adulterated: . . .

"In case of food: . . .

"Fifth—If it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, that when in the preparation of food products for shipment they are preserved by an external application, applied in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservatives shall be printed on the covering of the package, the provisions of this act shall be construed as applying only when such products are ready for consumption; and formaldehyde, hydrofluoric acid, boric acid, salicylic acid and all compounds and derivatives thereof are hereby declared unwholesome and injurious. . . .

"§ 22. SALE OF PRESERVATIVES PROHIBITED.] No person, firm or corporation shall manufacture for sale, advertise, offer or expose for sale, or sell, any mixture or compound intended for use as a preservative or other adulterant of milk, cream, butter or cheese, nor shall he manufacture for sale, advertise, offer or expose for sale, or sell any unwholesome or injurious preservative or any mixture or compound thereof intended as a preservative of any food: *Provided, however*, that this section shall not apply to pure salt added to butter and cheese."

A trial by jury was waived. There was a stipulation of facts setting forth, in substance, that the defendant had sold in Chicago two packages of the preservative in question; that the compound contained 'boric acid'; that the label on the packages bore the following statement: "It is not claimed for this Compound that it contains anything of food value, but it is an antiseptic preparation, and among its many uses may be employed to prevent canned fruits and vegetables from souring and spoiling"; that the preservative was not offered for sale or sold in any food product, but only separately as a preservative; and that the defendant was accorded a hearing before

the State Food Commission pursuant to the provisions of the Food law.

There was also introduced in evidence on behalf of the State an envelope, used for enclosing the compound, upon which were statements as to its uses, prices, etc. It was thus stated that the preservative could be used 'in canning all kinds of fruit,' and was 'especially valuable for corn, beans, peas,' etc. There was also the statement on the envelope that the contents 'of this package' were sufficient for 'four quarts' and that the retail prices were from ten cents for one 'package' to one dollar for fifteen 'packages.' That was the case for the State.

A motion to dismiss was denied. The plaintiff then made an offer of proof, and thereupon it was stipulated that a witness in court, if sworn, would testify that the "Price Canning Compound is an article of commerce, which has been sold under that distinct name for a period of years, with the ingredients and in the proportions contained in the sample taken by the Food Department, which is the subject of this suit; that it has acquired a wide reputation over a large number of States in the Union as a distinctive article, used for canning by the housewife"; that "it is not sold to manufacturers of food or canners of food for sale"; and that "boric acid is a constituent part of the compound and has been such during all the time that the compound has been sold."

Objection to evidence offered that "there is no added ingredient of any kind whatever, whether it be injurious, deleterious, or otherwise," was sustained as not being addressed to the charge made. The defendant (the plaintiff in error) also offered to prove "that boric acid is not injurious to health or to the human system" and that the "Price Canning Compound is not adulterated or mislabeled in any way." The offer was rejected, and the defendant excepted. In response to a further offer, it was conceded that the witness, if placed upon the stand, would

testify that the compound "is an article of commerce, sold in Illinois in the original package manufactured in Minnesota."

Upon this state of the record, the contention of the plaintiff in error that the statute was inapplicable, or, if applicable, was repugnant to the constitution of the State, and to the Commerce Clause and the Fourteenth Amendment of the Federal Constitution, were overruled.

The Supreme Court of the State thus construed the statute:

"We will first notice the objection of plaintiff in error that section 8 deals only with foods; that the declaration in that section that boric acid is injurious and unwholesome is limited to foods containing that substance as an added ingredient, and has no application to a preservative which is not, and does not purport to be a food.

"Both sections 8 and 22 are parts of one act, and the act as a whole, should be so construed as to give effect to its manifest purpose and intent. Its main purpose is to protect health by preventing adulteration of food by any unwholesome and injurious ingredient. Boric acid is declared to be unwholesome and injurious, and the sale of any food to which it is an added ingredient is prohibited. It was well known to the legislature that various compounds are manufactured and sold for preserving foods of different kinds. If such preservatives contain unwholesome and injurious ingredients, their use by the housewife, or any one else, in preserving fruits or food, would be as injurious to the health as if they had been added by a dealer or manufacturer to fruits or other foods before placing them on the market. The object of the act is to protect the public health by preventing dealers from selling food to which had been added, for the purpose of preserving it, ingredients injurious to the health, or from selling any compound as a preservative which contained any such ingredients. The prohibition is not against the

sale of all preservatives, but is against only unwholesome or injurious preservatives. . . . It is just as important to prohibit the sale to the housewife of a compound containing boric acid, to be used by her to preserve fruits and vegetables put up by her for family use, as it is to prohibit the sale of fruits and vegetables after such an ingredient has been added. We think the reasonable construction of the act to be that the prohibition against boric acid is not limited to foods to which it is an added ingredient, but extends to compounds sold as a food preservative which contain boric acid. The danger to health is as great from one as the other, and the prohibition of both was necessary to effect the evident purpose of the legislature." 257 Illinois, pp. 592, 593.

The plaintiff in error challenges the correctness of this construction, but this question is simply one of local law with which we are not concerned. We accept the decision of the Supreme Court of the State as to the meaning of the statute, and, in the light of this construction, the validity of the act under the Federal Constitution must be determined. *Missouri Pacific Ry.* v. *Nebraska*, 164 U. S. 403, 414; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 466; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 73; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 198.

The first Federal question is presented by the contention that the statute, as applied, effects a deprivation of property without due process of law and a denial of the equal protection of the laws contrary to the Fourteenth Amendment.

The State has undoubted power to protect the health of its people and to impose restrictions having reasonable relation to that end. The nature and extent of restrictions of this character are matters for the legislative judgment in defining the policy of the State and the safeguards required. In the avowed exercise of this power, the legislature of Illinois has enacted a prohibition—as the statute is

construed—against the sale of food preservatives containing boric acid. And unless this prohibition is palpably unreasonable and arbitrary we are not at liberty to say that it passes beyond the limits of the State's protective authority. *Powell* v. *Pennsylvania*, 127 U. S. 678, 686; *Crowley* v. *Christensen*, 137 U. S. 86, 91; *Holden* v. *Hardy*, 169 U. S. 366, 395; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 246; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 25; *Silz* v. *Hesterberg*, 211 U. S. 31, 39; *McLean* v. *Arkansas*, 211 U. S. 539, 547; *Chicago, Burlington & Quincy R. R.* v. *McGuire*, 219 U. S. 549, 569; *Purity Extract Co.* v. *Lynch*, *supra; Hammond Packing Co.* v. *Montana*, 233 U. S. 331, 333. The contention of the plaintiff in error could be granted only if it appeared that by a consensus of opinion the preservative was unquestionably harmless with respect to its contemplated uses, that is, that it indubitably must be classed as a wholesome article of commerce so innocuous in its designed use and so unrelated in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizen. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided. It is not a case where the legislature has confined its action to the prohibition of that which is described in general terms as unwholesome or injurious, leaving the issue to be determined in each case as it arises. The legislature is not bound to content itself with general directions when it considers that more detailed measures are necessary to attain a legitimate object. *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 288. Legislative particularization in the exercise of protective power has many familiar illustrations. The present case is one of such particularization, where the statute—read as the

state court reads it—specially prohibits preservatives containing boric acid. The legislature thus expressed its judgment and it is sufficient to say, without passing upon the opinions of others adduced in argument, that the action of the legislature cannot be considered to be arbitrary. Its judgment appears to have sufficient support to be taken out of that category. See *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, 51; Circular No. 15 (June 23, 1904), Bureau of Chemistry; Food Inspection Decision 76 (July 13, 1907); Bulletin (December 31, 1914), Bureau of Chemistry;—U. S. Department of Agriculture.

It is further urged that the enactment, as construed, contains an unconstitutional discrimination against the plaintiff in error, but in this aspect, again, the question is whether the classification made by the legislature can be said to be without any reasonable basis. The legislature is entitled to estimate degrees of evil and to adjust its legislation according to the exigency found to exist. And, applying familiar principle, it cannot be said that the legislature exceeded the bounds of reasonable discretion in classification when it enacted the prohibition in question relating to foods and compounds sold as food preservatives. *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251, 256; *Heath & Milligan Co.* v. *Worst*, 207 U. S. 338, 354; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 235; *Eberle* v. *Michigan*, 232 U. S. 700, 706; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227; *Miller* v. *Wilson*, 236 U. S. 373, 383, 384. We find no ground for holding the statute to be repugnant to the Fourteenth Amendment.

The remaining contention is that the statute as applied violates the Commerce Clause. Treating the article as one on a footing with adulterated food, the power of the State to prohibit sales within its borders is broadly asserted on its behalf. On the other hand, the plaintiff in error insists that the compound is not an adulterated

food, and was not charged to be such, but was an article of commerce manufactured in another State; and that whatever may be the power of the State of Illinois over manufacture and sale apart from interstate commerce, the State could not prohibit its introduction and sale in the course of interstate commerce. It is not necessary, however, to deal with the question in the scope thus suggested. The sole ground for invoking the Commerce Clause in order to escape the restrictions of the state law is sought to be found in the doctrine with respect to sales in original packages. *Brown* v. *Maryland*, 12 Wheat. 419; *Leisy* v. *Hardin*, 135 U. S. 100; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 22, 23. The record, however, is wholly insufficient to support the contention. The stipulation of facts read in evidence by the State set forth that the defendant had sold in Chicago 'two packages' of the compound. The State then introduced in evidence an 'envelope used for enclosing the compound.' This, among other things, bore a statement that the content of "this package is sufficient for four quarts." And it set forth prices as follows: "Retail Price. 1 Package 10c. 3 Packages 25c. 7 Packages 50c. 15 Packages $1.00." The clear inference from this evidence was that the compound was offered for sale at retail in small packages (in envelopes) suitable for the consumer. The defendant made an offer of proof, and in lieu of the offered testimony it was conceded that the witness, if sworn, would testify that the compound mentioned in the statement of claim "is an article of commerce sold in Illinois, in the original package manufactured and made in Minnesota." As to the nature of the package, nothing more was shown. All that was admitted was entirely consistent with the view that the original package referred to was simply the small package in the envelope which the State had described, and no error can be charged to the state court in so regarding it. Nothing appeared as to the character

of the shipment from Minnesota to Illinois, and it would be wholly unjustifiable to assume that, in commercial shipments into the State, the small package was segregated or separately introduced. If these small packages were associated in their shipment into the State, as they naturally would be, and were subsequently sold separately or in various lots, these separate packages although respectively in the original envelopes would not be classed as 'original packages' within the rule invoked, so as to escape the local law governing domestic transactions. We have repeatedly so held, in cases not materially different in this respect. *Austin* v. *Tennessee*, 179 U. S. 343; *Cook* v. *Marshall County*, 196 U. S. 261; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 199–201. The testimony offered by the plaintiff in error, and treated as received, taken in connection with what had already been proved as to the character of the packages put up for retail sale, fell far short of the proof required to constitute a defence upon the ground that the state law, otherwise valid, was applied in contravention of the Commerce Clause.

It should be added that no question is presented in the present case as to the power of Congress to make provision with respect to the immediate containers (as well as the larger receptacle in which the latter are shipped) of articles prepared in one State and transported to another, so as suitably to enforce its regulations as to interstate trade. *McDermott* v. *Wisconsin*, 228 U. S. 115, 135. It does not appear that the state law as here applied is in conflict with any Federal rule.

Judgment affirmed.

PENNSYLVANIA RAILROAD COMPANY *v.* CLARK BROTHERS COAL MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 290. Argued May 14, 1915.—Decided June 21, 1915.

The essential character of commerce determines whether it is interstate or intrastate and not mere billing or the place where title passes.

Where, for the purpose of filling contracts with purchasers in other States, coal is delivered, f. o. b. at the mine, for transportation to such purchasers, the movement and the facilities required are those of interstate commerce.

Whether the rule or method of car distribution for mines furnishing coal f. o. b. at the mines for shipment to other States as practiced by a railroad company is unjustly discriminatory is one which the Interstate Commerce Commission has authority to pass upon.

Where the complaint involves an attack upon the rule or method of car distribution practiced by the carrier in distributing cars for interstate shipments, no action is maintainable in any court for damages alleged to have been inflicted thereby until the Commission has made its finding as to the reasonableness of such rules and methods.

Under such conditions the Interstate Commerce Commission has authority to examine into, and report upon, the amount of damages sustained by a shipper by reason of such discrimination, [redacted] rules as to car distribution are within the provision of § 3 of the Act to Regulate Commerce.

Where, as in this case it appears that the Act to Regulate Commerce has been violated and the requisite ruling as to the unreasonableness of the practice assailed has been made by the Commission, § 9 applies and is exclusive, and the shipper must elect between a proceeding for reparation award before the Commission or a suit in the Federal court. He cannot resort to the state court.

After a proceeding before, and award by, the Commission, suit may be brought under § 16 of the act in either a state or a Federal court.

The Act to Regulate Commerce governs the shippers no less than it governs the carrier.

Where a shipper goes before the Interstate Commerce Commission, with a complaint under that act against a carrier for discrimination on car distribution and secures a finding of illegality of the carrier's violation of the act, and obtains an award, his claim for damages by reason of such violation can be prosecuted only under the Interstate Commerce Act, and a suit cannot be maintained therefor under the state statute; and this is so notwithstanding the fact that the action in the state court is brought before the Commission has made the award.

Penna. R. R. v. *Puritan Coal Co.*, 237 U. S. 121, and *Ill. Cent. R. R.* v. *Mulberry Hill Coal Co.*, *ante*, p. 275, distinguished as in those cases the shipper had not invoked the jurisdiction of the Commission, attacking the carrier's rule.

241 Pa. St. 515, reversed.

THE facts, which involve the right of a shipper of coal to recover damages from a carrier for alleged inadequate and discriminatory car service, and the construction of the statute of Pennsylvania and of the provisions of the Interstate Commerce Act applicable thereto, are stated in the opinion.

Mr. Francis I. Gowen and *Mr. John G. Johnson*, with whom *Mr. F. D. McKenney* was on the brief, for plaintiff in error:

The state court was without jurisdiction to entertain action.

Cars for coal sold f. o. b. mines are vehicles of interstate transportation.

The adequacy of ratings of defendant in error's mines was erroneously submitted to the jury.

The award of the Interstate Commerce Commission is a bar. *Hillsdale Coal Co.* v. *Penna. R. R.*, 19 I. C. C. 356; *Inter. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Jones* v. *Penna. R. R.*, 17 I. C. C. 361; *Morrisdale Coal Co.* v. *Penna. R. R.*, 176 Fed. Rep. 230; *S. C.*, 230 U. S. 304; *Penn Refining Co.* v. *West. N. Y. & Penna. Ry.*, 137 Fed. Rep. 343; *Puritan Coal Mining Co.* v. *Penna. R. R.*, 237 Pa. St. 420.

Mr. A. M. Liveright and *Mr. A. L. Cole* for defendant in error:

The state court has jurisdiction. The distribution itself was improper under the state law. The proceedings before, and the award made by, the Interstate Commerce Commission is not a bar to this action.

In support of these contentions, see *Atlantic Coast Line* v. *No. Car. Comm.*, 206 U. S. 1; *Chi., M. & St. P. Ry.* v. *Iowa*, 233 U. S. 334; *Hennington* v. *Georgia*, 163 U. S. 299; *Hillsdale Coal Co.* v. *Penna. R. R.*, 228 Pa. St. 61; *Last Chance Min. Co.* v. *Tyler Min. Co.*, 157 U. S. 687; *Louis. & Nash. R. R.* v. *Kentucky*, 161 U. S. 677; *Same* v. *Same*, 183 U. S. 503, 518; *Meeker* v. *Lehigh Valley R. R.*, 236 U. S. 433; *Missouri Pac. Ry.* v. *Larabee Mills*, 221 U. S. 612; *New Orleans* v. *Citizens Bank*, 167 U. S. 371, 397; *Nor. Pac. R. R.* v. *North Dakota*, 216 U. S. 579; *Penn Refining Co.* v. *West. N. Y. & Penna. Ry.*, 137 Fed. Rep. 343; *Puritan Coal Min. Co.* v. *Penna. R. R.*, 237 Pa. St. 453; *Richmond &c. R. R.* v. *Patterson Tobacco Co.*, 169 U. S. 311; *Savage* v. *Jones*, 225 U. S. 501; *Smith* v. *Alabama*, 124 U. S. 465; *Southern Pac. Co.* v. *United States*, 168 U. S. 1, 48; *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651; *West. Un. Tel. Co.* v. *Commercial Mill Co.*, 218 U. S. 406; *West. Un. Tel. Co.* v. *James*, 162 U. S. 650; *Wisconsin &c. R. R.* v. *Jacobson*, 179 U. S. 287.

Mr. Justice Hughes delivered the opinion of the court.

This suit was brought in January, 1912, by the Clark Brothers Coal Mining Company (defendant in error) in the Court of Common Pleas of Clearfield County, Pennsylvania, to recover damages for inadequate and unjustly discriminatory car service and supply. The complaint related to the action of the defendant company with respect to cars required for the transportation of coal from the plaintiff's mines known as Falcon, Nos. 2, 3,

and 4, in Clearfield County, and Falcon, Nos. 5 and 6, in Indiana County, Pennsylvania, between October, 1905, and April 30, 1907. A statute of Pennsylvania [Act of June 4, 1883, P. L. 72, 4 Purd. 3906; see Const. (Pa.) 1873, Art. 17] prohibits undue or unreasonable discrimination by any common carrier 'in charges for or in facilities for the transportation of freight within this State or coming from or going to any other State,' and provides that the carrier guilty of unjust discrimination shall be liable 'for damages treble the amount of injury suffered.'

On behalf of the defendant (plaintiff in error) the jurisdiction of the court to entertain the action was challenged upon the ground that with respect to car distribution the defendant was subject to the Act to Regulate Commerce, and that the claim of the plaintiff was cognizable only by the Interstate Commerce Commission or by the courts of the United States. It was urged further that in a proceeding before the Interstate Commerce Commission, which had been instituted by the plaintiff against the defendant prior to the beginning of this action, the Commission had found that the method of car distribution practiced by the defendant with respect to the plaintiff's mines known as Falcon, Nos. 2, 3, and 4, was unjustly discriminatory, and that the Commission had made an award of damages accordingly; and that by reason of this proceeding and the action of the Commission the plaintiff was precluded from maintaining the present action so far as it related to the alleged loss sustained with respect to the mines last described.

The trial court overruled these contentions of the defendant. The jury, finding discrimination, assessed the damage at $41,481 and trebled the amount making $124,443. Motions in arrest of judgment and for a new trial and for judgment *non obstante veredicto*, upon the grounds above stated (and others) were denied. Judgment for the total amount of the verdict was entered and

was affirmed by the Supreme Court of the State, 241 Pa. St. 515. And this writ of error has been sued out.

It clearly appeared that the proceeding before the Interstate Commerce Commission as to the mines Falcon, Nos. 2, 3, and 4, embraced substantially the same claim as that litigated in this action. As the trial judge said: "It" (the plaintiff) "did get an award of damages for what we understand to be practically the same subject-matter." That proceeding was instituted by the plaintiff in June, 1907. Its petition, among other things, alleged that it had been, and was, 'engaged in mining and shipping coal to points and places of delivery and to the coal markets beyond the State of Pennsylvania,' and that it had during all the period mentioned, to wit, 'from the fifteenth day of October, 1905, to the date of the filing of this complaint' orders for coal to be mined and shipped 'beyond the lines of said State.' It complained of the rating of its mines by the defendant and also of unjust and unreasonable discrimination against it in the daily distribution of cars 'for the transportation of its coal into the interstate markets'; that it had suffered "great loss and damage in its business 'as a producer, shipper and seller of bituminous coal' in the interstate coal trade, and that such damage amounted in the aggregate to $36,401.12. It prayed for hearing, for an ascertainment of the damages which it had sustained in its interstate business by reason of unreasonable preferences given to its competitors as alleged, and for a determination of the proper basis of car distribution to be observed. After hearing, the Commission made its report on March 7, 1910. 19 I. C. C. 392. On the same day, the Commission rendered its decision in *Hillsdale Coal & Coke Co.* v. *Penna. R. R.* (19 I. C. C. 356), involving similar questions as to the method practiced by the defendant in distributing 'its available coal car equipment.' Upon this point, the Commission there said:

"Under a rule announced by it on February 1, 1903,

the defendant seems to have charged all railroad cars, regardless of ownership, and private cars not owned by the operator loading them, against the distributive share of each mine, but it treated its own fuel cars as a special allotment in addition to the distributive share. On March 28, 1905, a notice was sent to shippers of bituminous coal from mines on the lines of the defendant advising them that thereafter all railroad cars, regardless of ownership, and all private cars not owned by the operator loading them, should be considered as cars available for distribution, except its own company fuel cars and fuel cars sent upon its lines by foreign companies and specially consigned to particular mines.

"On January 1, 1906, the defendant divided all cars into two classes which it designated as 'assigned' and 'unassigned' cars. In the former class were its own fuel cars, foreign railway fuel cars, and individual or private cars loaded by their owners or assigned by their owners to particular mines. The rule then made effective and still in force provides that the capacity in tons of any 'assigned' cars shall be deducted from the rated capacity in tons of the particular mine receiving such cars, and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all 'unassigned' or system cars." *Id.*, p. 362.

After illustrating the operation of this system and the advantage in distribution thus given to mines having assigned cars (*Id.*, pp. 363, 364), the Commission concluded:

"Upon all the facts shown of record the Commission therefore finds that throughout the period of the action the system upon which the defendant distributed its available coal-car equipment, including system fuel cars, foreign railway fuel cars, and individual or private cars, has subjected the complainant to an undue and an unlawful discrimination."

In the case of the plaintiff's petition, the Commission held that so far as the rating of its mines was concerned 'there was no substantial basis for any finding of discrimination.' But, in the matter of car distribution, unjust discrimination was found. The Commission said (19 I. C. C. 394–6):

"There are a number of mines on the Moshannon branch of the defendant that are owned by other operators, but in this connection it will suffice to mention only the six mines operated by or for the Berwind-White Coal Mining Company, one of which, known as Eureka No. 27, immediately adjoins the complainant's Falcon No. 2. The same 'D' coal vein is worked in these two mines. The quality of the coal is therefore the same and it is claimed that the capacities of the two mines were substantially the same at the period involved in the first of these two complaints. . . .

"But neither Falcon No. 2 nor the mines of the complainant, the Clark Brothers Coal & Mining Company, was placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal-car equipment during the period of the actions. . . .

"It is established with reasonable clearness on the record that the Berwind-White mines during the years 1906 and 1907, as well as to a period immediately preceding those dates, were daily in receipt of coal cars in large numbers and were therefore kept in operation almost continuously while the complainants received an inadequate supply and were not able, therefore, to run their mines to the best advantage. This difference is largely explained by the fact that the Berwind-White Coal Mining Company owned a large number of private cars and also enjoyed contracts for supplying the defendant and its connection with coal. Under the rules of defendant, fully explained in *Hillsdale Coal & Coke Co.* v. *P. R. R. Co.*, *ante*, the owner-

ship of such private cars and the enjoyment of these contracts resulted in the special allotment to the mines of that company of these so-called assigned cars. For the reasons explained at some length in that case those rules operated as an undue discrimination against these complainants, and we so find. But for the present and for the reasons there explained we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby."

Order was entered accordingly condemning the defendant's rule and practice of distribution (as stated) as a violation of § 3 of the Act to Regulate Commerce, requiring the defendant to desist from that practice, and reserving the question of damages for further consideration. Subsequently, in April, 1911, this question was submitted, and it was determined on March 11, 1912. 23 I. C. C. 191. The Commission then made its report as follows: "We now find that the damages sustained by this claimant as result thereof" (the discrimination found) "amounted to $31,127.96, and that it is entitled to an award of reparation in that sum, with interest from June 25, 1907."

The Commission set forth its primary findings of fact upon which this ultimate finding was based, showing its calculations with respect to shipments, selling prices, cost of production, and profits, during the times in question. It found the number of tons, in case of each of the mines, actually shipped and the amount which would have been shipped and sold, with a proper car supply, for 'interstate destinations,' that is, for points without the State of Pennsylvania.

This action was brought after the first report of the Commission, and while the question of damages was under

its consideration. The trial judge in charging the jury described the system of car distribution in use, and the practice of the defendant prior to and after January 1, 1906. Referring to the rule promulgated on that date, it was recognized that it in effect gave a distinct advantage to the mine having 'assigned cars' over one that did not have them, but the jury were instructed that 'for the purposes of this case,' it might 'be considered that it was a fair rule of distribution.' The subject committed to them was thus stated in the concluding portion of the instructions: "In considering the damages, therefore, in case you find discrimination, you must first ascertain what would have been, under all the circumstances testified to, a fair rating of the plaintiff's mines in both regions. Second, if after having such fair rating a comparison with the alleged preferred shippers would entitle it to an increased number of cars and what that increased number of cars would be, and if the evidence at the same time shows that the preferred shipper received day by day and month by month throughout the period of the action, an excess over its proper *pro rata* share, the plaintiff would be entitled to recover at your hands a verdict for what you may find its fair share of such excess of cars amounted to in tons, estimated just as we have laid down the rule with respect to the method of calculating. Now then, if you allow for discrimination, then you may disregard all question as to inadequacy or insufficiency of car supply, because you cannot allow for both. For discrimination, after you have made an estimate of the amount of damages and found a definite sum as compensation for the injuries which it sustained, that would be single damages, and if you find that there was discrimination, as claimed by the plaintiff's counsel then you can go to the question as to whether there shall be treble damages under the Act of 1883. . . . If you find discrimination, therefore, and you arrive at or estimate the amount of single damages which you believe

the plaintiff has sustained by reason of such undue and unreasonably discriminatory acts practiced against it, it is for you to say whether or not that amount should be trebled, that is, multiplied by three." The jury, as we have said, did find discrimination, and trebled the damages.

In considering the right of the plaintiff to maintain this action, despite the proceeding before the Commission, an initial question is presented as to the nature of the commerce involved. It appeared, as stated by the state court, that practically all the coal mined by the plaintiff was sold f. o. b. cars at the mines. About ninety-five or ninety-eight per cent. was sold in this way. Hence, it is said, it is "not subject to Interstate Commerce regulation."

We do not understand that it is questioned that a very large part of the damages recovered in this action pertain to coal which with a fair method of car distribution would have been shipped from the mines to purchasers in other States. There is no controversy as to the course of business. The plaintiff sold to persons within and without the State of Pennsylvania. The coal was loaded on cars to be transported to various points of destination not only in Pennsylvania but in other States. The transportation to other States absolutely depended upon a proper supply of cars, and it is manifest that unjust discrimination against the plaintiff in car distribution would improperly obstruct the freedom of such transportation, in which the plaintiff had a direct interest. And the question presented is whether unjust discrimination of this character is a subject which falls without the scope of the jurisdiction conferred upon the Interstate Commerce Commission, that is, whether there is an absence of such jurisdiction merely because the plaintiff sold its product, which was to be transported to other States, f. o. b. at its mines.

This question must be answered in the negative. In

determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing, or the place at which title passes, is not determinative. If the actual movement is interstate, the power of Congress attaches to it and the provisions of the Act to Regulate Commerce, enacted for the purpose of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, apply. *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512; *So. Pac. Terminal Co.* v. *Inter. Comm. Comm.*, 219 U. S. 498, 526, 527; *Ohio R. R. Comm.* v. *Worthington*, 225 U. S. 101, 108, 110; *Savage* v. *Jones*, 225 U. S. 501, 520; *Texas & N. O. R. R.* v. *Sabine Tram Co.*, 227 U. S. 111, 127; *Louisiana R. R. Comm.* v. *Tex. & Pac. Ry.*, 229 U. S. 336; *Ill. Cent. R. R.* v. *Louisiana R. R. Comm.*, 236 U. S. 157, 163. Thus, in the case of *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, *supra*, cotton seed cake which had been purchased by one Young at various places in Texas was shipped to him at the port of Galveston, where it was prepared for export. The court sustained the jurisdiction of the Interstate Commerce Commission with respect to the transportation to Galveston, although between Texas points, it being an incident to the export movement, and held that the special privileges given by the Terminal Company to Young on the wharf were undue preferences. As the commodity was destined for export it made no difference, said the court, 'that the shipments of the products were not made on through bills of lading or whether their initial points were Galveston or some other points in Texas.' In *Ohio Railroad Commission* v. *Worthington*, *supra*, it appeared that the State Commission had established a rate on what was called 'lake cargo coal' transported from a coal field in eastern Ohio to ports in the same State on Lake Erie for carriage thence by lake vessels to other States. Ordinarily, the shipper had the coal transported 'upon bills of lading to himself, or to

another for himself,' at Huron, Ohio. The rate covered the transportation to Huron and the placing of the coal on the vessels and trimming it for its interstate journey. In view of the proved nature of the movement, the court held that the action of the State Commission was an attempt directly to regulate interstate commerce and the enforcement of the order of the State Commission was enjoined. Again, in *Savage* v. *Jones*, 225 U. S. 501, 520, the complainant was a manufacturer in Minnesota and sold his commodity to purchasers in Indiana, the delivery being f. o. b. cars at Minneapolis for transportation to Indiana in the original unbroken packages, the freight being paid by the purchasers. Referring to an objection similar to the one here urged, the court said: "In answer, it must again be said that 'commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.' *Swift & Co.* v. *United States*, 196 U. S. 375, 398; *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512. It clearly appears from the bill that the complainant was engaged in dealing with purchasers in another State. His product manufactured in Minnesota was, in pursuance of his contracts of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce in the freedom of which from any unconstitutional burden the complainant had a direct interest." In *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 127, it was found that the Powell Company bought lumber for export to different ports in Europe through the ports of Sabine and Port Arthur, both in Texas. To fill its export contracts, it purchased of the Sabine Tram Company a large amount of lumber, which according to the seller's option was delivered f. o. b. cars at Sabine, Texas. There were separate bills of lading for delivery at Sabine to the Sabine Tram Company. Upon arrival at Sabine, the lumber was carried a short distance beyond the station to the dock where it was unloaded from

cars into water of the slip ready for loading upon ships. The Sabine Tram Company had no connection with the further carriage. The railroad company collected, over protest, the rates fixed by tariffs filed with the Interstate Commerce Commission, and the Sabine Tram Company brought suit to recover the difference between the amount thus paid and the amount which would have been payable at the rate fixed by the State Commission. The court held that the rate fixed by the Interstate Commerce Commission was applicable as the lumber was destined for export and that, as the movement was one actually in the course of transportation to a foreign destination, the form of the billing to Sabine, and the transactions there, were not determinative.

Thus, in varying circumstances, the same principle has been applied in these cases and in the others cited; and that principle is that the jurisdiction of the Commission is determined by the essential character of the commerce in question. In the present case, to repeat, it appears that for the purpose of filling contracts with purchasers in other States, coal is delivered f. o. b. at the mines for transportation to such purchasers. The movement thus initiated is an interstate movement and the facilities required are facilities of interstate commerce. A very large part of what in fact is the interstate commerce of the country is conducted upon this basis and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity, or as to the payment of freight, where the actual movement is interstate, does not affect either the power of Congress or the jurisdiction of the Commission which Congress has established.

In this view, we come to the consideration of the effect of the proceeding before the Commission.

1. The question whether the rule or method of car distribution practiced by the railroad company was un-

justly discriminatory was one which the Commission had authority to pass upon. *Inter. Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Same* v. *Chicago &c. R. R.*, 215 U. S. 479; *Morrisdale Coal Co.* v. *Penna. R. R.*, 230 U. S. 304, 313; *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121, 131. Further, by reason of the nature of the question involved in an attack upon the rule or method of the company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule. *Tex. & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 441, 448; *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 493; *Robinson* v. *Balt. & Ohio R. R.*, 222 U. S. 506, 511; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87, 107; *Morrisdale Coal Co.* v. *Pennsylvania Railroad, supra; Pennsylvania Railroad* v. *Puritan Coal Co., supra.* The Commission also had authority to make examination and report upon the amount of damages which the plaintiff had suffered from the unjust discrimination alleged in its complaint. We deem the provisions of the Act to be clear upon this point. See §§ 8, 9, 13, 16. There is nothing in the Act to suggest that the damages which may thus be ascertained are only those arising from unreasonable or unjustly discriminatory rates. Rules as to car distribution that are unjustly discriminatory are within the purview of section three, and damages thereby occasioned, as well as those due to the exaction of unreasonable rates, arise from the violation of the Act and their ascertainment is within the scope of the Commission's authority. See *Inter. Com. Comm.* v. *Ill. Cent. R. R., supra; Mitchell Coal Co.* v. *Penna. R. R.*, 230 U. S. 247, 257; *Morrisdale Coal Co.* v. *Penna. R. R., supra; Pennsylvania Railroad* v. *Puritan Coal Co.*, 237 U. S. 121.

2. Where, as in this case, it appears that the Act has

been violated, and the requisite ruling as to the unreasonableness of the practice assailed has been made by the Commission, the provisions of section nine are applicable. This section provides:

"SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." . . .

This provision defines the remedies to which a person in the situation of the plaintiff is entitled, and the terms of the provision clearly indicate that these remedies are exclusive. The express requirement of an election between the proceeding before the Commission and suit in the Federal court leaves no room for the conclusion that there is an option in such case to resort to the state court. Where the proceeding has been had before the Commission and reparation awarded, suit under section sixteen (as amended in 1910) may be brought in either a state or a Federal court, but this is after the Commission's award has been made.

In *Pennsylvania Railroad* v. *Puritan Coal Co.*, *supra*, construing section nine, the court said: "It will be seen that this section does more than create a right and designate the court in which it is to be enforced. It gives the shipper the option to proceed before the Commission or in the Federal courts. The express grant of the right of choice between those two remedies was the exclusion of any other remedy in a state court. . . . In *Mit-*

chell Co. v. *Penna. R. R.*, 230 U. S. 250, the same view of the statute was taken in discussing another, but related, question. This construction is also supported by the legislative history of the statute. For while the Hepburn Act, as a convenience to shippers, permitted suits on Reparation Orders to be brought in the Federal court of the District where the plaintiff resided or the Company had its principal office; and while the Act of 1910 (36 Stat. 554) in further aid of shippers, permitted suits on Reparation Orders to be brought in state or Federal courts, it made no change in §§ 8 and 9 which, as shown above, gave the shipper the option to make complaints to the Commission or to bring suit in a United States court." Referring to the proviso in section twenty-two, with respect to the preservation of existing remedies, it was then pointed out that the proviso was not intended to nullify other parts of the Act, but to maintain existing rights which were not inconsistent with those which the statute created. And, finally, with regard to a case such as the present one, where the Commission at the instance of the injured party has made its ruling as to the unreasonableness or unjustly discriminatory character of the practice attacked, the court thus defined the remedy available: "Until that body" (the Commission) "has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in § 9."

3. It is said that the present action is brought to recover damages caused by the violation or discriminatory enforcement of the carrier's own rule, and that in such case, no administrative question being involved, resort to the Commission was not necessary. And this, it is urged,

was held in *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121. See also *Illinois Central R. R.* v. *Mulberry Hill Coal Co.*, decided June 14, 1915, *ante*, p. 275. The distinction, however, is apparent. In the cases cited the plaintiff had not invoked the jurisdiction of the Commission. In this case, it had done so. It went before the Commission, with its complaint under the Act, assailing the rule of the company, and it secured from the Commission a finding as to the illegality of the rule and the violation of the Act. This proceeding established the character of the claim so far as interstate transactions were concerned, and it could be prosecuted solely under the Federal statute. This follows necessarily from the supremacy of the Federal legislation in relation to interstate commerce. So long as the creative provisions of the Federal act did not appear to be involved, and the wrong was not disclosed in the aspect presented by the Commission's finding, the plaintiff was free to avail itself of common-law remedies or of those afforded by local statutes. But when, as a result of its own insistence upon its Federal right under the Act, it appeared that the Act had been violated and that the special remedial provisions of the Act were applicable, it was not possible for the plaintiff to ignore the statute it had thus called into play and disregard its provisions for the purpose of measuring relief by local standards. The Federal statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commission's finding, that statute determined the extent of the damages it was entitled to recover with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the state court and there to secure treble damages under the state statute with respect to the same transactions.

This is not to say that the finding of the Commission as to the amount of damages has any other effect than

that prescribed in section sixteen of the Act. It is simply to hold that the plaintiff, having demanded and obtained the appropriate ruling from the Commission as to the discrimination which had been practiced, was then entitled to proceed for the recovery of damages in accordance with the Act, and not otherwise. The fact that the Commission had not made its award of damages at the time the action was brought is immaterial. The proceeding before the Commission was pending and the plaintiff's right and remedy were fixed by the Federal act.

We conclude, therefore, that with respect to the damage sustained by the plaintiff in its interstate business by reason of the unjustly discriminatory distribution of cars for interstate shipments, the plaintiff was not entitled to maintain this action under the state statute. The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MILLS, AS SURVIVING PARTNER OF NAYLOR & COMPANY, *v.* LEHIGH VALLEY RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 631. Argued May 11, 1915.—Decided June 21, 1915.

In a suit under § 16 of the Act to Regulate Commerce, a report of the Interstate Commerce Commission finding that the rate complained of was unreasonable, and awarding specified amount for reparation, is *prima facie* evidence of the damages sustained although the evidential or primary facts are not set forth. *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412; *id.* 434.

Where the Interstate Commerce Commission makes an award to a

shipper complaining of unreasonable and discriminatory rates, as reparation, it expresses such decision as a matter of ultimate fact, and under the provisions of the Act to Regulate Commerce the form of expression is not confined to a particular formula.

The Act to Regulate Commerce does not allow any attorney's fee for reparation proceeding before the Commission, but only allows such a fee in an action in the courts based on the reparation award. *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 432.

THE facts, which involve claims of shippers against the carriers for unreasonable and discriminatory rates, are stated in the opinion.

Mr. V. F. Gable and *Mr. Arthur R. Thompson*, with whom *Mr. Frank Van Sant* was on the brief, for plaintiff in error:

The report and order of the Commission awarding reparation discloses sufficient findings of fact on which the award is based.

The measure of damages is proper.

The Commission's report on rehearing is based on report of original hearing.

There was no error in the trial court, but the Circuit Court of Appeals erred. *Allen* v. *C., M. & St. P. Ry.*, 16 I. C. C. 293; *Baer Bros.* v. *Denver & R. G. R. R.*, 233 U. S. 479; *Burton* v. *Driggs*, 87 U. S. 125; *Burr* v. *Des Moines*, 1 Wall. 99; *Cassell* v. *B. & O. Ry.*, 8 I. C. C. 333; *Commercial Club of Omaha* v. *C. & N. Ry.*, 7 I. C. C. 386; *Hathaway* v. *Cambridge Nat'l Bank*, 134 U. S. 494; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 91; *Louis. & Nash. R. R.* v. *Behlmer*, 175 U. S. 648; *Lehigh Valley Ry.* v. *Clark*, 207 Fed. Rep. 717; *Lehigh Valley Ry.* v. *Meeker*, 211 Fed. Rep. 785; *Logan* v. *Davis*, 233 U. S. 613; *McClure* v. *United States*, 116 U. S. 145; *Meeker* v. *Lehigh Valley Ry.*, 236 U. S. 412; *Mitchell Coal Co.* v. *Penna. R. R.*, 230 U. S. 247; *Naylor & Co.* v. *Lehigh Valley Ry.*, 15 I. C. C. 9; *New Haven R. R.* v. *Int. Com.*

Comm., 200 U. S. 361; *Penna. Ry.* v. *International Coal Co.*, 230 U. S. 184; *Parsons* v. *C. & N. Ry.*, 167 U. S. 447; *Louis. & Nash. R. R.* v. *Dickerson*, 191 Fed. Rep. 705; *Perry* v. *F., L. & Cen. Penn. Ry.*, 5 I. C. C. 97; *Riverside Mills* v. *Atlantic Coast Line*, 168 Fed. Rep. 989; *Seaboard Air Line* v. *Seegers*, 207 U. S. 73; *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 364; *Southern Ry.* v. *Tift*, 206 U. S. 428; *Stone* v. *United States*, 164 U. S. 380; *Tex. & Pac. Ry.* v. *Abilene Cotton Co.*, 204 U. S. 426; *Un. Pac. Ry.* v. *United States*, 116 U. S. 154; *United States* v. *Balt. & Ohio Ry.*, 226 U. S. 14, 20; *United States* v. *Pugh*, 99 U. S. 265; *United States* v. *N. Y. Indians*, 173 U. S. 464; *United States* v. *Hill*, 120 U. S. 169; *Wright* v. *United States*, 105 U. S. 381.

Mr. Henry S. Drinker, Jr., with whom *Mr. Edgar H. Boles*, *Mr. John G. Johnson* and *Mr. Samuel Dickson* were on the brief, for defendants in error.

Mr. Justice Hughes delivered the opinion of the court.

During the years 1906 and 1907, Naylor & Company—a firm of which the plaintiff in error is surviving partner—were shippers of pyrites cinder over the lines of the defendants in error from Buffalo, New York, to points in Pennsylvania and New Jersey. The published rate was $2 per gross ton. On April 4, 1908, these shippers filed a complaint with the Interstate Commerce Commission, alleging that the rate was 'excessive,' 'unreasonable' and 'unjustly discriminatory.' They asked that the railroad companies be ordered to desist from exacting the rate, that a lower rate be fixed, and that reparation be granted. The defendants answered and, after hearing, the Commission made its report on January 5, 1909, holding 'that the rate on pyrites cinder should not exceed the rate on iron ore from Buffalo.' The rate on iron ore was $1.45 per

ton to points of destination to which there was a rate of $2 on pyrites cinder. Reparation was refused. *Naylor & Company* v. *Lehigh Valley Railroad Company*, 15 I. C. C. 9. Order was made accordingly.

On May 8, 1909, Naylor & Company filed with the Interstate Commerce Commission a motion for a rehearing on the question of reparation alone, and the motion was granted. Additional evidence was taken and various sums were awarded by the Commission against the respective companies as reparation on shipments made within the period of limitation. The order was made on June 2, 1910.

In May, 1911, this suit was brought, pursuant to § 16 of the Act to Regulate Commerce, in the Circuit Court of the United States for the Eastern District of Pennsylvania to recover the several amounts of money set forth 'as and for damages and reparation' in accordance with the Commission's order. Issue was joined by a plea of not guilty. Upon the trial, the two reports and orders of the Interstate Commerce Commission, above mentioned, were received in evidence over objection. There was testimony that the amounts awarded had not been paid. That constituted the case for the plaintiffs, and the defendants offered no evidence. A request by the defendants for 'binding instructions' in their favor was refused. The case was submitted to the jury with the instruction, in substance, that the finding of the Commission was *prima facie* evidence of the facts and that it was for the jury to say whether the plaintiffs were entitled to recover the amount of money claimed. A verdict was returned for the plaintiffs in specified amounts which appear to be the same as those awarded by the Commission with interest to date. The defendants then moved for judgment *non obstante veredicto*. The motion was dismissed and judgment ordered for the plaintiffs on October 30, 1912. At the same time, the trial court allowed to the counsel for the plaintiffs a fee of $1,000 for their services in the proceedings

before the Interstate Commerce Commission and a further fee of like amount for their services in this suit; and to this allowance the defendants excepted. Exceptions having also been taken to the refusal of the request of the court to direct a verdict for the defendants, to the instruction given, and to the dismissal of the motion for judgment *non obstante veredicto*, proceedings in error were had before the Circuit Court of Appeals, where the judgment was reversed, without directing a new trial. *Lehigh Valley R. R.* v. *Clark*, 207 Fed. Rep. 717. And to review the judgment, this writ of error has been prosecuted.

The grounds of the ruling of the court below are: first, that there were no sufficient findings of fact in the reports of the Commission, as required by the statute; and, second, that the plaintiffs had failed to present any evidence which made out a *prima facie* case of damage sustained. That is, it is said that if the statements in the first report of the Commission could be regarded as findings of fact within the meaning of the statute so as to make them *prima facie* evidence of the facts found, they were not sufficient to support the plaintiffs' claim; and that there were no facts found in the second report which entitled the plaintiffs to go to the jury.

The fundamental question thus presented, with respect to the effect of the Commission's reports and orders, has recently been determined in *Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, and, in the light of the conclusion there reached, little need now be said. In dealing with the objection that the reports and orders of the Commission then before the court did not contain any findings of fact, or at least not enough to sustain an award of damages, it was held that the statute does not require a statement of the evidential or primary facts. The court said: "We think this is not the right view of the statute and that what it requires is a finding of the ultimate facts—a finding which, as applied to the present case, would dis-

close (1) the relation of the parties as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claims arose; (3) the rates paid by the shipper for the service rendered and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practiced against the shipper . . ; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper . . . was excessive and unreasonable and, if so, what would have been a reasonable rate for the service; and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and if so, the amount of his damages."

In the case now under consideration, the first report of the Commission was concerned only with the rates which should be charged. No reparation was allowed and no findings whatever were made as to damages.

The second report is as follows:

"In the report made by this Commission following an inquiry into the reasonableness of the rate of $2 per gross ton exacted by the defendants for the transportation of pyrites cinder from Buffalo, N. Y., to points in the States of Pennsylvania and New Jersey the rate was found excessive, and the defendants were ordered to establish a rate not to exceed that contemporaneously applying on shipments of iron ore between the same points. Reparation was denied. *Naylor & Co.* v. *L. V. R. R. Co.*, 15 I. C. C. 9.

"Pursuant to the Commission's order the defendants reduced the rate on pyrites cinder to $1.45, the rate on iron ore. The complainant thereupon filed a motion for rehearing upon the question of reparation, and after consideration by the Commission the motion was granted. Additional evidence was taken and the parties were heard in oral argument.

"We now find that the rate of $2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the statute of limitations. *Detroit Chemical Works* v. *N. C. Ry. Co.*, 13 I. C. C. Rep. 357; *Same* v. *Erie R. R. Co.*, 13 I. C. C. Rep. 363.

"The Buffalo, Rochester & Pittsburg Railway Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $2,846.55, with interest from November 21, 1907, as reparation for the collection of unreasonable charges on 189 carloads of pyrites cinder aggregating 5,175–1590/2240 tons in weight moving from Buffalo to various Pennsylvania points.

"The New York Central & Hudson River Railroad Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $248.93, with interest from April 19, 1907, as reparation for the collection of unreasonable charges on 13 carloads of pyrites cinder aggregating 452–1370/2240 tons in weight, moving from Buffalo to various Pennsylvania points.

"The Delaware, Lackawanna & Western Railroad Company and the Central Railroad Company of New Jersey will be required to refund to the complainant $487.52, with interest from September 23, 1907, as reparation for the collection of unreasonable charges on 31 carloads of pyrites cinder aggregating 886–960/2240 tons in weight, moving from Buffalo to Newark, N. J.

"The Lehigh Valley Railroad Company and the Central Railroad Company of New Jersey will be required to refund to the complainant $1,024.15, with interest from November 13, 1907, as reparation for the collection of unreasonable charges on 74 carloads of pyrites cinder

aggregating 1,862–220/2240 tons in weight, moving from Buffalo to various Pennsylvania and New Jersey points.

"The Lehigh Valley Railroad Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $2,362.23, with interest from November 13, 1907, as reparation for the collection of unreasonable charges on 172 carloads of pyrites cinder aggregating 4,295–20/2240 tons in weight, moving from Buffalo to various Pennsylvania and New Jersey points.

"It will be ordered accordingly."

This report, it will be observed, shows the relation of the parties as shipper and carrier in interstate commerce; the general character of the traffic involved and the amount of the shipment with respect to which reparation was claimed; the determination that the rate exacted (which was specified) was unjust and unreasonable to the extent that it exceeded the established rate (also specified); and, further, the determination that the companies respectively should pay a stated amount 'as reparation for the collection of unreasonable charges' on the quantities mentioned. It is at once apparent that these findings meet the test laid down in the *Meeker Case*, unless it can be said that they were insufficient as to the amount of damages suffered. Thus, there would seem to be no room for question that the finding that the rate charged was unreasonable is a sufficient finding. The Commission stated: "We now find that the rate of $2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton." It is insisted that, in view of the provisions of the first order, and the Commission's description of it in the second report, the essential basis of the ruling was not the inherent reasonableness of the rate established but its relation to the rate on a competitive commodity. We think, however, that the specific

finding in the second report that the rate exacted 'was unjust and unreasonable' to the extent specified, was a finding as to the ultimate fact of unreasonableness which should be taken precisely as made. The finding in this respect is substantially the same as that in the second *Meeker Case* (236 U. S. 434, 435, 436).

As to the amount of damage sustained, there would be no question if the Commission had found, as in the case last cited, that the shipper 'was damaged' to the amount mentioned. The distinction attempted to be drawn is that in the case referred to there was a statement that the shipper 'was damaged' while in the present case the Commission held that he was entitled to the stated amount 'as reparation.' In both cases, the amount actually allowed was the difference between the amount charged and that which would have been payable at the rate sanctioned. The difference between the findings in the two cases, we think, is merely in the form of words used.

When the Commission made the award '*as reparation*' they undoubtedly expressed the decision, as a matter of ultimate fact, that there was injury to this extent to be repaired. No other intelligent construction can be put upon their statement. If, as was held in the second *Meeker Case*, a finding of the amount of damage as a finding of ultimate fact is sufficient, the expression of that finding is not confined to a particular formula. What the Commission decided was that the shippers were entitled to reparation, that is, to be made whole, to be compensated for a loss because of an illegal and unreasonable exaction, and the amount which they stated as the sum to be paid 'as reparation' on the specified shipments was the amount which they found necessary to accomplish the reparation,—to afford the compensation. The statute was not concerned with mere forms of expression and in view of the decision that a finding of the ultimate fact of the amount of damage is enough to give the order of the

Commission effect as *prima facie* evidence, we think that the trial court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim. But when the Commission has found that there was damage to a specified extent, *prima facie* the damage is shown; and, according to the fair import of its decision, the Commission did find the amount of damage in this case.

There was error, however, in the allowance of the fee for services before the Commission. 236 U. S. 432, 433.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is modified by striking out the allowance of $1,000 as attorney's fee for services before the Commission, and is affirmed as so modified.

It is so ordered.

THE SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY *v.* DANAHER.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 43. Submitted March 17, 1914. Restored to docket April 6, 1914. Reargued April 22, 1914.—Decided June 21, 1915.

While it is not open in this court to revise the construction placed on a state statute by the state court, it is open to determine whether the application of the statute as so construed is so arbitrary as to so contravene the fundamental principles of justice as to amount to deprivation of property without due process of law.

The rates of public service corporations, such as telephone companies, are fixed in expectation that they will be paid, and reasonable regulations tending towards prompt payment are necessary as the ability of such corporation to serve the public depends upon the prompt collection of their rates.

Collection of such rates by legal process being practically prohibitive,

regulations requiring payment in advance are not unreasonable, and a telephone company is not subject to penalties for refusing to render service to a subscriber who is delinquent on past rates and refuses to pay in advance in accordance with an established rule uniformly enforced, or because it charges the full price to a subscriber who does not pay in advance while allowing a stated discount to those who do pay in advance.

To enforce against a telephone company a penalty for refusing to furnish service under such conditions amounts to depriving it of its property without due process of law in violation of the Fourteenth Amendment.

102 Arkansas, 547, reversed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of a statute of Arkansas relating to telephone companies, are stated in the opinion.

Mr. David A. Frank, with whom *Mr. Charles T. Coleman* was on the brief, for plaintiff in error:

As to the construction of the Act of March 31, 1885, see *Cumberland Telephone Co.* v. *Kelly*, 160 Fed. Rep. 316; *Pacific Telephone Co.* v. *Railway*, 66 Maryland, 399; *Plummer* v. *Hattelstead*, 117 N. W. Rep. 680; *Smith* v. *Telephone Co.*, 158 S. W. Rep. 980; *Hockett* v. *State*, 105 Indiana, 250; *Cent. Union Tel. Co.* v. *State*, 106 Indiana, 1; *State* v. *Citizens Tel. Co.*, 61 S. Car. 83; *Cumberland Tel. Co.* v. *Hendon*, 71 S. W. Rep. 435; *State* v. *Nebraska Tel. Co.*, 17 Nebraska, 126; *People* v. *Gas Co.*, 45 Barb. 146; *Postal Tel. Co.* v. *Cumberland Tel. Co.*, 177 Fed. Rep. 726; Jones on Telephones, §§ 495, 496.

The Act of March 31, 1885, as construed by the Supreme Court of Arkansas, is in conflict with the due process clause of the Fourteenth Amendment. *Mo. Pac. Ry.* v. *Nebraska*, 217 U. S. 196; *Mo. Pac. Ry.* v. *Tucker*, 230 U. S. 340.

As to the right to make regulations see *Cumberland Tel. Co.* v. *Kelly*, 160 Fed. Rep. 316; *Stamey* v. *West. Un. Tel. Co.*, 18 S. E. Rep. 1008; *McDaniel* v. *Faubush Tel. Co.*, 106 S. W. Rep. 825; *West. Un. Tel. Co.* v. *Neil*, 25 S. W. Rep.

15; *Davis* v. *West. Un. Tel. Co.*, 32 S. E. Rep. 1026; 3 Thompson on Corporations (2 ed.), 2110; 37 Cyc. 1619.

As to the duty to make regulations and the reasonableness of the regulations in this case, see *Rushville Tel. Co.* v. *Irvin*, 27 Ind. App. 62; *Tacoma Hotel Co.* v. *Land Co.*, 3 Washington, 316; *West. Un. Tel. Co.* v. *McGuire*, 104 Indiana, 130; *Vanderberg* v. *Gas Co.*, 126 Mo. App. 600; *Jones* v. *Nashville*, 72 S. W. Rep. 985; *Watauga Water Co.* v. *Wolfe*, 41 S. W. Rep. 1060; *Shiras* v. *Ewing*, 26 Pac. Rep. 320; *Buffalo Tel. Co.* v. *Turner*, 118 N. W. Rep. 1064; *Brass* v. *Rathbone*, 47 N. E. Rep. 905; *Hewlett* v. *West. Un. Tel. Co.*, 28 Fed. Rep. 181; *Yancey* v. *Batesville Tel. Co.*, 81 Arkansas, 586; *Southwestern Tel. Co.* v. *Murphy*, 100 Arkansas, 546; *Phillips* v. *Southwestern Tel. Co.*, 72 Arkansas, 478; *Cumberland Tel. Co.* v. *Kelly*, 160 Fed. Rep. 316.

The act of March 31, 1885, as construed by the Supreme Court of Arkansas, is in conflict with the equal protection clause of the Fourteenth Amendment. *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Ex parte Young*, 209 U. S. 123.

Mrs. Adelia P. Danaher, with whom *Mr. Mike Danaher* was on the brief, *pro se:*

Defendants in error cited in support of the contentions on her behalf, *American Waterworks Co.* v. *Walker*, 64 N. W. Rep. 711; *Brass* v. *Rathbone*, 47 N. E. Rep. 905; *Buffalo Tel. Co.* v. *Turner*, 118 N. W. Rep. 1064; *Budd* v. *New York*, 143 U. S. 517; *Chicago &c. R. R.* v. *Jones*, 149 Illinois, 361; *C., B. & Q. Ry.* v. *Iowa*, 94 U. S. 155; *Crumley* v. *Watauga Water Co.*, 41 S. W. Rep. 1058; *Dow* v. *Beidelman*, 125 U. S. 680; *Hewlett* v. *West. Un. Tel. Co.*, 28 Fed. Rep. 181; *Jones* v. *Nashville*, 72 S. W. Rep. 985; *Merrimack Sav. Bank* v. *Lowell*, 29 N. E. Rep. 97; *Mo. Pac. Ry.* v. *Tucker*, 230 U. S. 340; *Munn* v. *Illinois*, 94 U. S. 113; *Rushville Telephone Co.* v. *Irwin*, 27 Ind. App.

62; *Seaboard Air Line* v. *Seegars*, 207 U. S. 73; *Shiras* v. *Ewing*, 29 Pac. Rep. 320; *State* v. *Nebraska Tel. Co.*, 17 Nebraska, 126; *Stone* v. *Trust Co.*, 116 U. S. 307; *Tacoma Hotel Co.* v. *Land Co.*, 3 Washington, 316; *Vanderberg* v. *Gas Co.*, 126 Mo. App. 600; *Watauga Water Co.* v. *Wolfe*, 41 S. W. Rep. 1060; *West. Un. Tel. Co.* v. *McGuire*, 104 Indiana, 130; *Wood* v. *City*, 20 L. R. A. 376; *Yazoo & Miss. Valley R. R.* v. *Vinegar Co.*, 226 U. S. 217.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action against a telephone company by one of its patrons to recover penalties at the rate of $100 per day for 63 days for alleged discrimination against the plaintiff, the right of recovery being grounded upon a statute of Arkansas, Kirby's Digest, § 7948, reading as follows:

"Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality; provided, such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that are not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business, by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under penalty of one hundred dollars for each day such company continues such discrimination, and refuses such facilities after compliance or offer to comply with the reasonable regulations and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused."

For several years the company had been conducting a general telephone exchange at Little Rock, Arkansas, with over 5,000 patrons, among them being the plaintiff. One of its established regulations was to the effect that it would not furnish telephone service to any patron in arrears for past service and would not accord to a patron so in arrears the discount usually allowed for paying in advance of a designated time. The customary monthly rate was $2 during the first part of the period in question and thereafter $2.75 with a deduction of 50 cents if payment was made before the fifteenth of the month.

The discrimination charged by the plaintiff consisted (a) in arbitrarily refusing for forty days to permit her to use the telephone in her residence when she had made prompt payment therefor at the customary monthly rate and had fully complied with all existing rules, notwithstanding other patrons similarly situated were permitted to use the telephones in their residences during that period; and (b) in requiring her to pay at the rate of $2.75 per month for the period covering the next 23 days when other patrons similarly situated were required to pay only $2.25 per month for the same period. In its answer the company denied the plaintiff's allegations of payment and discrimination, as also her compliance with existing rules, and relied upon the regulation before mentioned as justifying the company's action in denying her the use of the telephone during the forty days and in requiring her to pay the full rate of $2.75 for the month covering the next 23 days. In that connection it was alleged in the answer that the regulation was adopted in good faith several years before and had been uniformly and impartially enforced; that at the times when the plaintiff's telephone was disconnected, and when she was refused the discount of 50 cents, she was indebted to the company in the sum of $4 for the service for two months preceding; that the company's acts were in entire accord with the regulation

and with timely notices theretofore given to the plaintiff, and that the statute, if held to authorize or require the infliction of the designated penalties by reason of what was done in impartially enforcing the regulation, would be purely arbitrary and would result in depriving the company of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

At the trial the plaintiff produced evidence tending to establish the charges in her complaint, and when the company was introducing its evidence it offered to prove that when the plaintiff's telephone was disconnected and when she was refused the discount of 50 cents she had failed and refused to pay her telephone rental for two months preceding, although she frequently had been requested to pay it and knew the telephone would be disconnected if payment was not made; that the regulation before named had been in force for several years and had been applied universally against all delinquent patrons without partiality or discrimination, and that the plaintiff was denied the use of the telephone and refused the discount only because she was delinquent at the time. This evidence was rejected, and in its charge to the jury the court, at the plaintiff's request, said: "Under the law, the defendant should not refuse to serve the plaintiff because she had not paid a debt contracted for services rendered in the past, and if you find that the defendant did refuse to render her services for that reason, your verdict should be for the plaintiff." The defendant asked the court to say to the jury: "If you find from the evidence that the defendant enforced against plaintiff the same rule or regulation that it enforced against all others in like situation with the plaintiff, your verdict will be for the defendant," and this request was refused. The trial resulted in a verdict and judgment for the plaintiff for the penalties claimed, amounting to $6,300, and the judgment was af-

firmed by the Supreme Court of the State. 102 Arkansas, 547. At a former trial the defendant had prevailed, but that judgment was reversed and a new trial directed, the Supreme Court saying on that occasion, 94 Arkansas, 533, 537: "A telephone company, being a public servant, cannot refuse to serve any one of the public in that capacity in which it has undertaken to serve the public when such one offers to pay its rates and comply with its reasonable rules and regulations. It cannot refuse to serve him until he pays a debt contracted for services rendered in the past. For the present services it has a right to demand no more than the rate of charge fixed for such services. It transcended its duty to the public when it demanded more." Of course what was then said led to the rulings just stated upon the second trial. In affirming the second judgment the Supreme Court adhered to its prior decision, pronounced the regulation unreasonable and held that its enforcement against the plaintiff was a discrimination against her within the meaning of the statute and subjected the company to the penalties therein prescribed.

It was not doubted by the state court, but on the contrary was fully recognized, that the telephone company was entitled to adopt reasonable regulations respecting the conduct of its business and the terms upon which it would serve its patrons, and could enforce such regulations against any patron refusing or failing to comply therewith by suspending or discontinuing the service to him during the continuance of his refusal or failure without being chargeable with discrimination or incurring any liability under the statute. Thus the questions for decision arising out of the rulings at the trial were whether the regulation dealing with patrons in arrear with their rental was reasonable, and whether its impartial enforcement in the circumstances of this case could be made the occasion, consistently with the due process of law clause in the Fourteenth Amendment, for inflicting upon the company pen-

alties aggregating $6,300. As before indicated, the first question was answered in the negative and the second in the affirmative.

Of course, it is not open to us to revise the construction placed upon the statute by the state court, but it is open to us to determine whether the application made of the statute in this instance was so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve. What then are the circumstances in the light of which this question must be determined?

Regulations like that which the telephone company applied to the plaintiff were not declared unreasonable by the statute. It left that matter entirely open and to be determined according to general principles of law. The state court did not hold otherwise. The regulation, according to the rejected proof, was adopted in good faith, had been uniformly and impartially enforced for many years and was impartially applied in this instance. There had been no decision in the State holding or indicating that it was unreasonable. Like regulations often had been pronounced reasonable and valid in other jurisdictions [1] and while some differences of opinion upon the subject were disclosed in reported decisions the weight of authority was on that side. It also was strongly supported in reason, for not only are telephone rates fixed and regulated in the expectation that they will be paid, but the

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[1] See *People* v. *Manhattan Gas Co.*, 45 Barb. 136; *Tacoma Hotel Co.* v. *Tacoma Light & Water Co.*, 3 Washington, 316; *Wood* v. *Auburn*, 87 Maine, 287; *Rushville Telephone Co.* v. *Irvin*, 27 Ind. App. 62; *Irvin* v. *Rushville Tel. Co.*, 161 Indiana, 524; *Jones* v. *Nashville*, 109 Tennessee, 550; *Cox* v. *Cynthiana*, 123 Kentucky, 363; *Mansfield* v. *Humphreys Mfg. Co.*, 82 Oh. St. 216; *Woodley* v. *Carolina Telephone Co.*, 163 N. Car. 284; *Vanderberg* v. *Kansas City Gas Co.*, 126 Mo. App. 600, 608; *Shiras* v. *Ewing*, 48 Kansas, 170; *Vaught* v. *East Tennessee Telephone Co.*, 123 Tennessee, 318.

company's ability properly to serve the public largely depends upon their prompt payment. They usually are only a few dollars per month and the expense incident to collecting them by legal process would be almost prohibitive. It uniformly is held that a regulation requiring payment in advance or a fair deposit to secure payment is reasonable, and this is recognized in the brief for the plaintiff where it is said that to protect themselves against loss telephone companies "can demand payment in advance." If they may do this, it is difficult to perceive why the more lenient regulation in question was not reasonable.

If it be assumed that the state legislature could have declared such a regulation unreasonable, the fact remains that it did not do so, but left the matter where the company was well justified in regarding the regulation as reasonable and in acting on that belief. And if it be assumed that the company should have known that the Supreme Court of the State in the exercise of its judicial power might hold the regulation unreasonable, even though the prevailing view elsewhere was otherwise, the question remains whether, in the circumstances, penalties aggregating $6,300 could be imposed without departing from the fundamental principles of justice embraced in the recognized conception of due process of law. In our opinion the question must be answered in the negative. There was no intentional wrongdoing; no departure from any prescribed or known standard of action, and no reckless conduct. Some regulation establishing a mode of inducing prompt payment of the monthly rentals was necessary. It is not as if the company had been free to act or not as it chose. It was engaged in a public service which could not be neglected. The protection of its own revenues and justice to its paying patrons required that something be done. It acted by adopting the regulation and then impartially enforcing it. There was no mode of

judicially testing the regulation's reasonableness in advance of acting under it, and, as we have seen, it had the support of repeated adjudications in other jurisdictions. In these circumstances to inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law. *Missouri Pacific Ry.* v. *Tucker*, 230 U. S. 340, 351, and cases cited; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 661–666; *Vaught* v. *East Tennessee Telephone Co.*, 123 Tennessee, 318, 328.

It follows that the rulings of the trial court as sustained by the Supreme Court of the State tended to deprive the defendant of a right secured and protected by the Fourteenth Amendment.

Judgment reversed.

CHICAGO, MILWAUKEE AND ST. PAUL RAILROAD COMPANY *v.* STATE OF WISCONSIN.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 177. Argued March 8, 1915.—Decided June 21, 1915.

A State cannot authorize an individual to take salable property from another without pay—it amounts to deprivation of property without due process of law.

An owner's right to his property is protected even though he may not be actually using it, and the State cannot, under the due process clause of the Fourteenth Amendment, compel an owner of property to allow a third party to have free use thereof until such time as a buyer appears.

A state statute that does not purport to be a health measure cannot be sustained as such.

A state statute which is not a reasonable exercise of the police power

and yet operates to take property cannot be justified on the ground that the party whose property it takes may be able to get an increase in the rates obtained for property not taken. The taking of property and a fixed right to compensation must coincide.

While the right of the State to regulate public carriers in the interest of the public is very great, it does not warrant unreasonable interference with the right of management or the taking of the carrier's property without compensation.

The reserved right of altering and amending the charter of a corporation does not confer mere arbitrary power or authorize the taking of the corporation's property without compensation.

The statute of Wisconsin imposing penalties on sleeping car companies if, the lower berth of a sleeping car being occupied, the upper berth was let down before it was actually engaged, is unconstitutional under the due process clause of the Fourteenth Amendment as an arbitrary taking of property without compensation; nor can it be justified as a health measure under the police power of the State or as amendment or alteration of the charter of the corporation under the reserved power of the State in that respect.

152 Wisconsin, 348, reversed.

IN 1911 the State of Wisconsin passed a statute imposing a penalty upon Sleeping Car Companies if,—the lower berth being occupied—the upper berth was let down before it was actually engaged. Suit was brought against the plaintiff in error for the recovery of the statutory penalty, based on the fact that on the night of August 11, 1911, James T. Hall boarded the Company's sleeping car at Portage, Wisconsin. He engaged lower berth, Section 11 and occupied the same, as an intrastate passenger, between Portage, Wisconsin, and Star Lake, Wisconsin. The upper berth of No. 11 was not engaged or occupied, but was let down and kept down during the night by the porter.

The Company answered that its cars, like those of others in the United States, were so arranged as to provide units consisting of lower berths, upper berths, sections, drawing rooms and compartments; that the lower berth and upper berth units are so arranged that when

prepared for occupancy each of said units is a compartment separated from all other space in the car; that the charge for the use of each of said units is fixed by tariffs established by the State of Wisconsin and by the Interstate Commerce Commission respectively. Under the Wisconsin law the rate from Portage to Star Lake was $1.50 for a lower berth, $1.20 for the upper berth, and $2.70 for the section. It was averred and admitted that Hall, while demanding of the defendant's conductor "that the upper berth be put back and kept there, so that he might have the use of the entire section, paid for the use of the lower berth only and did not offer to pay the tariff for the entire section."

The Railroad Company further averred that it operated sleeping cars over its system of more than 7,000 miles of interstate roads, and that the Interstate Commerce Commission had prescribed rates for each of said sleeping car units on trains running to and from the State of Wisconsin. The rate fixed for the upper was 80 per cent. of the charge for the use of the lower; the price for the whole section being the sum of the two rates. No order had been made by the Interstate Commission which prohibits the use of the upper berth while the lower berth is occupied. It was averred that a compliance with the Wisconsin statute would convenience the occupant of the particular lower berth only, and would not add to the comfort or promote the health, safety or convenience of the other occupants of the car, but would injuriously affect passengers occupying lower berths.

The Company insisted that the statute was arbitrary and unreasonable; not designed to accomplish a legitimate public purpose and contrary to natural justice. It claimed that the statute denied to it the equal protection of the laws; took its property without due process of law in violation of the Fourteenth Amendment and attempted to regulate interstate commerce.

There was a hearing before the court without a jury. Some of the averments in the Railroad's answer were admitted to be true. In addition witnesses were sworn whose testimony—admitted over objection—was to the effect that—while the Company had a pecuniary interest in having the upper berth kept down when the lower was occupied yet,—such lowering was necessary to secure the comfort of the occupant of the lower berth and to prevent him or her from being wakened or disturbed if it became necessary to put down the upper berth and arrange it so that it could be occupied by a passenger who had purchased such upper space during the night. The evidence was to the effect that the opening of the curtains, the glare of the light, the noise of lowering the berth, the work of arranging the bedding for the upper berth and securing the holding wires would necessarily inconvenience the man or woman occupying the lower berth; deprive him or her of the privacy to which they were entitled and interrupt the rest and sleep to secure which they had engaged the berth.

There was evidence that an ordinary sleeping car was better ventilated than an ordinary passenger coach, said to be due to the fact that the coach not only carried more passengers but did not have the ventilating appliances in use on sleeping cars.

There was in addition much evidence, admitted over objection, to prove the methods by which and the extent to which sleeping cars were ventilated. It appeared that a car of ordinary size contained about 5,000 cubic feet of air and that, by means of a series of suction ventilators, operated by the movement of the train, the air therein was sucked through openings in the top of the car. The faster the movement the more rapid the suction. By measuring the air escaping through the ventilators, it had been shown that when the train was running at 35 miles an hour the air in the sleeping car was renewed every two minutes. This air was replaced by that coming through doors, end

openings for ventilating purposes, screens or windows as the case might be. There was also testimony that when the upper berth was down and the curtains closed the air came in and went out of the lower berth through windows, screens, air spaces, and numerous openings between the curtain and the bed.

There was evidence that while the circulation in the lower berth was not so good as that in the aisle, yet the air in the car and in such lower berth was not injurious to health as demonstrated by repeated chemical analyses of samples of air taken from such lower berths, from the aisles and from other portions of the cars. There was evidence, and contention based on common knowledge, that the letting down of the upper berth did not affect the health or convenience of the occupants of the car or of either berth. This was demonstrated by the absence of injurious effects and the fact that lower berths with the upper berths down had thus been constantly used by travellers since sleeping cars were invented.

There was further evidence that the car in question was arranged substantially like those operated by sleeping car companies throughout the United States. In all of them the upper berth was regularly put down when the lower was occupied, unless the whole section was engaged by one person. There was a further contention that this was true in every State in the Union,—no one of which prohibited the letting down of the upper when the lower was occupied.

The court found as a fact—

"That the closing of upper berths in sleeping-cars has very little effect upon the circulation of air in such sleeping-cars when all lower berths are made up and ready for occupancy.

"That the lowering of upper berths does not endanger the lives, health or safety of persons occupying lower berths in sleeping-cars.

"That the closing of the upper berth will be a convenience to the person occupying the berth below the same and will add to the comfort of such person alone and not to that of the public generally.

"That the defendant has a right to charge for the use of the space occupied by the upper berth and that such right is the property of the defendant."

He concluded, as matter of law, that the State was not entitled to recover the penalty and dismissed the complaint. The case was then taken to the Supreme Court of Wisconsin, which (152 Wisconsin, 348) said that "'the trial court held that the evidence showed a compliance with the act would affect the convenience and comfort of the traveling public in but a slight degree,' but that . . . the court's view of the evidence was evidently the result of the court's erroneous idea of what, in the legal sense, is essential to present an occasion or exigency involving the general welfare." The court further said "that in the light of common knowledge the evidence in the case tends to show that the effects of the regulation contribute to the comfort and convenience of the traveling public and thereby contribute to promote their health and general welfare," that the regulating "statute was a legal exercise of the police power;" and that the regulations only incidentally affect interstate commerce. The "law permits berths to be occupied and used when any person desires them and thus the defendant is secured against loss for services it may be able to furnish the public. . . ." It thereupon reversed the judgment of the trial court. The Railroad Company then brought the case here assigning as error that the judgment sustaining the statute deprived it of property without due process of law, interfered with its management of cars and made a discrimination between the privileges accorded state and interstate passengers in the same car at the same time.

Mr. Frank B. Kellogg, with whom *Mr. Burton Hanson* and *Mr. Gustavus S. Fernald* were on the brief, for plaintiff in error:

Chapter 272 of the 1911 laws of Wisconsin deprives plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws in taking its property for public use without compensation, and is therefore in violation of the Fourteenth Amendment of the Constitution of the United States.

Chapter 272 of the 1911 laws of Wisconsin is a regulation of commerce among the States, and is void under § 8 of Art. I of the Constitution of the United States.

Numerous authorities of this and other courts support these contentions.

Mr. Walter Drew, Deputy Attorney General of the State of Wisconsin, with whom *Mr. W. C. Owen*, Attorney General of the State of Wisconsin, was on the brief, for defendant in error:

The highest court of the State has construed the statute and held it constitutional.

The Wisconsin Upper Berth Law is a legitimate exercise of the police power of the State in behalf of the public health and welfare.

The law does not violate any rights of the plaintiff in error guaranteed by the Fourteenth Amendment nor is it unconstitutional as a regulation of interstate commerce.

The law is a valid exercise of the power reserved to the state legislature by § 1 of Art. XI of the state constitution to alter the corporate franchise of the plaintiff in error.

Numerous authorities of this and other courts support these contentions.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

There have been two statutes in Wisconsin relating to

letting down the upper berth when the lower was occupied. The first [1] left the matter to the decision of the occupant of the lower berth. The second [2] absolutely prohibits the upper from being let down before it is engaged or occupied.

Concerning the act of 1907, which provided that the occupant of the lower "should have the right to direct whether the unoccupied upper should be opened or closed," the Supreme Court (*State* v. *Redmon*, 134 Wisconsin, 89, 103) held that the statute was "not a police regulation, but an unwarranted interference with property rights; an attempt . . . to give any person at his option who pays for a part of a section in a sleeping car the use, free of charge, of the balance thereof; an obvious . . . attempt . . . to appropriate the property of one for the benefit of another in violation of several constitutional safeguards that might be referred to, but particularly the guarantee that no person shall be . . . deprived of life, liberty or property without due process of law." . . . "It follows that the arbitrary appropriation in the name of law of the space of an upper berth in a sleeping car for the greater comfort and safety, as regards the health of the occupant of the lower berth at his option, . . . is highly oppressive. . . ."

1. But the language of the Act of 1911, now under re-

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[1] "An act . . . relating to the health and comfort of occupants of sleeping-car berths.

"SEC. 1. Whenever a person pays for the use of a double lower berth in a sleeping-car, he shall have the right to direct whether the upper berth shall be open or closed, unless the upper berth is actually occupied by some other person; and the proprietor of the car and the person in charge of it shall comply with such direction." Laws of 1907, c. 266.

[2] "1. Whenever a person shall engage and occupy a lower berth in a sleeping-car, and the upper berth of the same section shall at the same time be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied." Laws of 1911.

view, does not remove the fundamental objection to that class of legislation. For as the State could not authorize the occupant of the lower berth to *take* salable space without pay, neither can the present statute compel the Company to *give* that occupant the free use of that space until it is actually purchased by another passenger. The owner's right to property is protected even when it is not actually in use, and the Company cannot be compelled to permit a third person to have the free use of such property until a buyer appears.

2. While this principle is recognized, it is said that this Act of 1911 was not passed for the purpose of benefiting the occupant of the lower berth, but as a health measure and in the interest of all the occupants of the car. But the statute does not purport to be a health measure, and cannot be sustained as such. For if lowering the upper berth injuriously interfered with the ventilation of the car and the health of the passengers it would follow that upper berths should not be lowered; and if it was harmful to let down the uppers it would be even more harmful to permit additional passengers to come into the car and occupy them. The testimony of witnesses and common knowledge coincide with the trial court's finding of fact that the lowering of upper berths does not endanger the lives, health or safety of persons occupying the lower berth and that keeping the upper closed will not add to the comfort of the public generally. *Lake Shore &c. Ry.* v. *Smith*, 173 U. S. 692. There are some inconveniences and discomforts incident to traveling on a sleeping car, but none of those resulting from the lowering of the upper berth are of a character that can be treated as a nuisance either in law or in fact. For lowering the upper berth is not only not treated as a nuisance or a serious inconvenience and discomfort to passengers, but the language of the statute itself recognizes that the sleeping car company might lawfully sell all of the upper berths and have each of them

occupied. The same is true of the order of the State Commission fixing a rate of $1.50 for the lower berth, $1.20 for the upper berth, and $2.70 for the section. This treats that the space in the section is salable, as a whole or in parts; and, if the space is thus lawfully salable, it is property entitled to protection.

3. The State Supreme Court cited *Lawton* v. *Steele*, 152 U. S. 133; *Lake Shore & M. S. Ry.* v. *Ohio*, 173 U. S. 285; *Atlantic Coast Line* v. *North Carolina Corp. Comm.*, 206 U. S. 1; *New York, N. H. & H. R. R.* v. *New York*, 165 U. S. 628; and after discussing the extent of the police power and the conditions under which it can be exercised, held that it was a reasonable exercise of such power to prohibit the upper berth from being lowered if not engaged or occupied, saying that "if compliance with this [statutory] command imposes extra burdens, they are not of such an unusual nature as to be oppressive; and if it involves additional costs in the conduct of the business, then the defendant can readily be secured against such loss by having the rate adjusted to meet this burden." But if the statute is not a reasonable exercise of the police power and yet operates to take property, such taking cannot be justified on the ground that the Company *may* be able to secure an increase in rates. For, without considering any other question involved, it is sufficient to say that the taking and a fixed right to compensation must coincide, though in some cases the time for payment may be delayed. *Sweet* v. *Rechel*, 159 U. S. 380, 400.

4. The plaintiff also insists that the requirement that the upper berth should not be let down until actually engaged also deprives the Company of its right of management and prevents it from conducting its business so as to secure the privacy of the man or woman occupying the lower berth. It is not necessary to refer to the evidence on that subject because it is a matter of common knowledge that to let down the upper berth during the night would

necessarily be an intrusion upon the privacy of those occupying lower berths. For the glare of the lights and the noise of lowering the upper berth would disturb any except the soundest sleepers. In this respect the statute would lessen the ability of the Company to furnish the place of sleep and rest which it offers to the public. A sleeping car may not be an "inn on wheels," but the operating company does engage to furnish its patrons with a place in which they can rest without intrusion upon their privacy. Holding out these inducements and seeking this patronage, the Company is entitled to the privilege of managing its business in its own way so long as it does not injuriously affect the health, comfort, safety and convenience of the public. The right of the State to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management or the taking of the carrier's property without compensation. *Lake Shore & Michigan Ry.* v. *Smith*, 173 U. S. 684; *Northern Pacific Ry.* v. *State of North Dakota*, 236 U. S. 585; *State of Washington ex rel. Oregon R. R.* v. *Fairchild*, 224 U. S. 510, 529; *Missouri Ry.* v. *Nebraska*, 164 U. S. 403, 417; *Great Northern* v. *R. R. Commission*, just decided, *ante*, p. 340.

5. In the brief of counsel for the State it is argued that the statute can be sustained as a valid exercise of the State's reserved power to alter the charter of the Company. That question does not seem to have been raised in the state court, nor was its decision based on that proposition. Indeed such a ruling would seem to have been opposed to *State ex rel. Northern Pacific* v. *R. R. Commission*, 140 Wisconsin, 157, and the *Water Power Cases*, 148 Wisconsin, 124, where it was held that the right to amend a charter does not authorize the taking of the Company's property without just compensation. The same view has been repeatedly expressed in the decisions of this court. For example in *Shields* v. *Ohio*, 95 U. S. 324, it was said

that "the power of alteration and amendment is not without limit. The alterations must be reasonable . . . and consistent with the scope and object of the act of incorporation." . . . Again in *Stearns* v. *Minnesota*, 179 U. S. 223, 259, it was held that the reserved right to amend a corporate charter "does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by . . . taking of property without due process of law." *Lake Shore &c. Ry.* v. *Smith*, 173 U. S. 690; *Stanislaus Co.* v. *San Joaquin Co.*, 192 U. S. 201; *Sinking-Fund Cases*, 99 U. S. 720; *Miller* v. *State*, 15 Wall. 498; see also *Delaware, Lackawanna &c.* v. *Board of Public Utilities*, 85 N. J. L. 28, 38, where it was held that, under such a power, the Company could not be required to furnish free transportation to certain designated officials. This conclusion makes it unnecessary to discuss the assignments relating to interstate commerce.

The judgment is reversed and the case remanded to the Supreme Court of Wisconsin for further proceedings not in conflict with this opinion.

Reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE HOLMES dissent.

WELLS FARGO & COMPANY EXPRESS *v.* FORD.

ERROR TO THE COUNTY COURT OF MADISON COUNTY, STATE OF TEXAS.

No. 259. Submitted May 5, 1915.—Decided June 21, 1915.

The carrier cannot be held responsible for goods taken from its custody by valid legal process provided it gives the owner prompt notice of the suit so that he may have an opportunity to protect his interest.

As the carrier is not bound to make any defense it is all the more bound to give the consignor notice so that he may appear and make his own defense.

Where the carrier gives notice of suit and the owner fails to appear or fails in his defense, and the seizure and sale of the property under judicial process amounts to *vis major*, the carrier cannot be held responsible for yielding thereto.

Where, as in this case, the carrier failed to give reasonable notice to the owner, it cannot plead the judgment obtained against it taking the owner's goods; and in such a case, if the judgment was rendered in another State, the refusal of the court to admit it on the common-law ground that notice was not given to the owner does not amount to a denial of full faith and credit under the Federal Constitution.

THE facts, which involve the liability of carriers for goods taken from them by legal process and also the construction and application of the full faith and credit clause of the Federal Constitution, are stated in the opinion.

Mr. H. M. Garwood and *Mr. C. W. Stockton* for plaintiff in error:

The defense in the court below was good.

Full faith and credit to the judicial proceedings of the court of the State of Illinois was denied. See Moore on Carriers (2d ed.), 327–331; *Carpenter* v. *Strange*, 141 U. S. 87; *Fauntleroy* v. *Lum*, 210 U. S. 230; *Green* v. *Van Buskirk*, 7 Wall. 139; *Harris* v. *Balk*, 198 U. S. 215; *Insur-*

ance Co. v. *Harris*, 97 U. S. 331; *M'Elmoyle* v. *Cohen*, 13 Pet. 312; *Simmons* v. *Saul*, 138 U. S. 439.

No appearance for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

D. W. Ford was a traveling salesman who was much of the time on the road, but considered Madisonville, Texas, as his home. On September 16, 1912, he shipped from that place to the Walker-Edmond Company, at Chicago, a package containing a ring with "C. O. D. charges thereon amounting to $35." When the package arrived in Chicago it was tendered to the consignee who refused to receive it or to pay the $35. The Walker-Edmond Company, in order to obtain possession of the ring, forthwith brought an action in replevin against Ford and the Express Company in the Municipal Court of Chicago. The writ, returnable October 4, was only served on the Express Company—the officer making return that Ford was not to be found. The Chicago agent of the Express Company on September 21 wrote the agent at Madisonville to notify Ford of the pendency of the suit to be tried on October 4. There is a claim that the agent at once wrote the Chicago office that Ford did not desire to employ counsel and would hold the Company responsible under its C. O. D. contract. The record shows that the local agent, on October 2, mailed a letter to Ford at Madisonville containing a notice that judgment would go by default unless Ford defended by October 4.

Ford claimed that he was absent from Madisonville during the months of September and October and received no notice of the pendency of the suit until after his return in November—and after the Municipal Court of Chicago had entered a default judgment, finding that Walker-Edmond Company was entitled to the possession of the ring.

Subsequently Ford demanded that the Express Com-

pany should return him the property or else pay him $35, which it had been instructed to "Collect on Delivery." On its failure to comply Ford brought suit in a Texas court against the Express Company which defended on the ground that it was not liable because the package had been taken from it by judicial process. In support of that defense it offered a copy of the Illinois record in the case of *Walker-Edmond Co.* v. *Wells, Fargo & Co. Express and D. W. Ford.* The judge of the County Court found that Ford had not been served in any way provided by law and "on account of the Express Company's negligence in failing to give the plaintiff legal notice of the pendency of the suit in Chicago it is liable on account of its negligence." Judgment was thereupon entered for Ford by the County Court of Madison County, Texas,—the highest court of that State having jurisdiction of the case—and the Express Company brought the case here by writ of error in which it complains of the failure of the Texas court to give full faith and credit to the judicial proceedings of the Municipal Court exercising jurisdiction under the laws of the State of Illinois.

In the brief it is said that, while the case is for a small sum, the writ of error is prosecuted to test the constantly recurring and, to it, important question as to whether the Express Company can be held liable to consignors who sue in one State to recover property which has been taken from the carrier by the judicial processes of another State. But the law is well settled. The carrier cannot be held for goods taken from its custody by valid legal process, provided it gives the owner prompt notice of the suit so that he may have an opportunity to protect his interest. For, as the land carrier is not bound (*The M. M. Chase*, 37 Fed. Rep. 708) to make a defense, it is all the more bound to give the consignor notice of the suit so that he may appear and make his own defense. *Ohio & M. R. R.* v. *Yohe*, 51 Indiana, 181; *Merz* v. *Chicago &c. Ry.*, 86

Minnesota, 35; *Bliven* v. *Hudson &c. R. R. Co.*, 36 N. Y. 403, 407. If the carrier gives such notice and the consignor fails to appear, or fails in his defense, and the property is seized, held, or sold under judicial process, the carrier cannot thereafter be held responsible for yielding to what must then be treated as *vis major*.

In the present case the carrier, in recognition of its duty to give notice, instructed the agent at Madisonville to notify Ford of the pendency of the suit. The local agent, without making inquiries to learn whether Ford was in town or absent, in the course of his business as a traveling salesman, contented himself with mailing a letter directed to Ford at Madisonville. This letter was posted only two days before the trial in Chicago and was not received by Ford until after his return to Madisonville, and after the judgment in the replevin suit had been entered against the Express Company. The Texas court held that the carrier was liable for the value of the consigned goods because it had been guilty of negligence in failing to give Ford legal notice.

That judgment, based on that common-law ground, did not deny full faith and credit to the Illinois judgment which was treated as valid between Walker-Edmond Co. and the Express Company. It, however, was not available to the Express Company because it established only one of the two elements which the carrier had to prove in order to make out its defense when sued by Ford for the property. For the carrier not only had to show that the package had been taken from it by a valid judicial process, but it also had to show that Ford had been given prompt notice of the pendency of the suit in which that process issued. The decision against the Express Company was based on its failure to prove that it gave the notice which was the condition precedent of its right to use the valid Illinois judgment.

Affirmed.

CENTRAL VERMONT RAILWAY COMPANY *v.* WHITE, ADMINISTRATRIX OF WHITE.

ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

No. 407. Argued April 23, 1915.—Decided June 21, 1915.

The filing of a large number of assignments of error perverts the purpose of the rule requiring assignments, and the practice cannot be approved. *Phillips* v. *Seymour*, 91 U. S. 648.

On writ of error to review a judgment of the state court in an action under the Federal Employers' Liability Act, this court considers only assignments relating to matters of practice, pleading and evidence involving the construction of the Federal statute.

It was not error in the trial court to refuse to direct a verdict for defendant on the ground that the proof failed to show negligence in allowing a faster freight train to run into a slower train in front of it, the engineer of the former having received notice that the track was clear and that it might proceed. The evidence was sufficient to support a verdict.

The Federal Employers' Liability Act abolishes the fellow servant rule and an employé does not assume risks arising from unknown defects in engines, machinery or appliances.

While matters of procedure depend upon the law of the place where the suit is brought, matters of substance in regard to an action based on a Federal statute depend upon the statute; and in an action under the Employers' Liability Act the burden of proof as to whether the employé was guilty of contributory negligence is a matter of substance and not of mere state procedure.

The Federal courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant, and have enforced the principle even in States which hold, as does Vermont, that the burden is on the plaintiff of proving that he was not guilty thereof.

In passing the Federal Employers' Liability Act Congress intended that it should be construed in the light of the decisions of the Federal courts made prior to the enactment in this respect.

In an action under the Employers' Liability Act rulings of the state court in regard to the effect of amendments and replications are

matters of state pleading and practice and the decisions of the state court are binding on this court.

Under Lord Campbell's Act, and in a few of the American States, the jury apportion damages in cases of death by negligence of defendant, but the omission of this requirement in the Employers' Liability Act indicates the intention of Congress to follow the practice in most of the American States of not requiring such apportionment.

In case the plaintiff sues under the Employers' Liability Act for the benefit of parties not entitled to share in the recovery, and if the verdict is increased by the result of such inclusion, defendant may raise the question in a manner appropriate under the practice of the court in which the trial is had. *North Carolina R. R.* v. *Zachary*, 232 U. S. 248.

Questions of general law in regard to admission of evidence in regard to delivery and contents of written papers and as to inspection of engines which involve no construction of the Employers' Liability Act cannot, under § 237, Judicial Code, be reviewed on writ of error to the state court.

87 Vermont, 330, affirmed.

THE facts, which involve the validity of a judgment for damages for personal injury in an action under the Employers' Liability Act, are stated in the opinion.

Mr. J. W. Redmond for plaintiff in error.

Mr. Warren R. Austin for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

1. On January 12, 1912, Enoch L. White was killed in a rear end collision while employed as brakeman on the Vermont Central, an interstate Railway. His Administratrix sued the Company, in a Vermont court, for "the benefit of the widow and next of kin, minor children." The jury returned a verdict of $7,168. The judgment thereon was affirmed by the Supreme Court of the State (87 Vermont, 330) and the case was brought here on a record containing so many assignments, covering 18

printed pages, as to make it proper to repeat the ruling in *Phillips* v. *Seymour*, 91 U. S. 648 that the "practice of filing a large number of assignments cannot be approved. It perverts the purpose sought to be subserved by the rule requiring any assignments." "It points to nothing and thwarts the purpose of the rule" (*Chicago Great Western Ry. Co.* v. *McDonough*, 161 Fed. Rep. 659) which was intended to present to the court a clear and concise statement of material points on which the plaintiff in error intends to rely. Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, to the sufficiency of exceptions, and to various rulings of the trial court which involve no construction of the Employers' Liability Act and which, therefore, cannot be considered on writ of error from a state court. *Seaboard Air Line* v. *Duvall*, 225 U. S. 477, 486.

2. We shall, therefore, only consider those assignments, discussed in the brief, which raise a Federal question. Among them is the contention that the court failed to direct a verdict for the defendant because the proof failed to show negligence of the company or to prove the facts necessary to establish liability under the Federal law. *Southern Pac. Co.* v. *Schuyler*, 227 U. S. 601; *North Carolina R. R.* v. *Zachary*, 232 U. S. 248.

The evidence showed that on the night of Jan. 1st, 1912, Enoch L. White was employed by the Central Vermont Railway Company as brakeman on extra freight train No. 401. It had passed several miles north of Bethel, Vermont, and was proceeding up grade at a low rate of speed. White and the other employés thereon had no notice that it was followed by a faster freight train (No. 708), which, at Bethel, had received a "Clearance Card" indicating that the track ahead was clear and that it might proceed. The engine, pulling train No. 708, had a leaking cylinder, from which steam escaped in such

quantities as to make it impossible for the engineer to see the tail lights of the train on which White was employed. The result was that the faster train (708) ran into the slower train (401) and in the collision White was killed. The evidence was amply sufficient to sustain a finding that the death of White was due to the fault of the agents of the Railway Company.

3. Complaint is made because the court failed to instruct the jury as to the law respecting the assumption of risks. But there was not only no request to charge on that subject, but there is no evidence that White knew of the negligence of the agent in giving a "Clearance Card" or of the leaking cylinder which obscured the vision of the engineer. He did not assume the risk arising from unknown defects in engines, machinery or appliances, while the statute abolishes the fellow servant rule. 35 Stat. 65, § 2. Under the facts there was, therefore, no error in failing to charge the jury on the subject of assumption of risks. *Southern Ry.* v. *Gadd*, 233 U. S. 572; *Gila Valley Ry.* v. *Hall*, 232 U. S. 102; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 504.

4. The defendant, however, insisted that White knew his train was behind time and running at a low rate of speed. The Company contended that, in view of these circumstances, it was his duty, under the rules, to put out lighted fusees and torpedoes in order to give warning of the presence of train No. 401 on the track. On that theory the Company asked the court to charge that the burden was on the Administratrix to show that White was not guilty of contributory negligence. In considering that exception the Supreme Court of Vermont held that the defendant's contention was based on a correct statement of the state rule, but said "This case, however, is brought upon an act of Congress which supersedes the laws of the State in so far as the latter cover the same field. Consequently the question of the burden of proof respect-

ing contributory negligence on the part of the injured employé is to be determined according to the provisions of that act, . . . ," Citing *Seaboard Air Line* v. *Moore*, 193 Fed. Rep. 1022; *S. C.*, 228 U. S. 434.

In this court the argument was devoted principally to a discussion of this ruling—counsel for the Railroad Company earnestly insisting that "the *lex fori* must determine all questions of evidence, including that of the burden of proof. Wharton on Conflict of Laws (3d ed.), § 478b." It was argued that there is nothing in the Federal statute indicating an intent to change the state rule as to the burden of proof, and it is claimed that because of the court's mistaken construction of the Federal Act the Railway Company has been deprived of a right to which it was entitled under the laws of Vermont.

There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. *McNiel* v. *Holbrook*, 12 Pet. 89. But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662; *Boyd* v. *Clark*, 8 Fed. Rep. 849; *Hollowell* v. *Horwick*, 14 Massachusetts, 188; *Cooper* v. *Lyons*, 77 Tennessee, 597 (2); *Newcombe* v. *Steamboat Co.*, 3 Iowa (G. Greene), 295. In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a state which gave a longer period within which to sue. So, too, as to the burden of proof. As long as the question involves a mere

matter of procedure as to the time when and the order in which evidence should be submitted the state court can, in those and similar instances, follow their own practice even in the trial of suits arising under the Federal law.

But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those States the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in States which hold that the burden is on the plaintiff. *Railroad* v. *Gladmon*, 15 Wall. 401 (1), 407–408; *Hough* v. *Railway Co.*, 100 U. S. 225; *Inland &c. Co.* v. *Tolson*, 139 U. S. 551 (4), 557; *Washington &c. R. R.* v. *Harmon*, 147 U. S. 581; *Hemingway* v. *Ill. Cent. R. R.*, 114 Fed. Rep. 843. Congress in passing the Federal Employers' Liability Act evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts. Such construction of the statute was, in effect, approved in *Sea Board Air Line* v. *Moore*, 228 U. S. 434. There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof.

5. There are, however, a series of assignments in this record which must be disposed of in conformity with the general principle that matters affecting the remedy are to be governed by the law of the forum. They are all based on the fact that, while the Railway Company had lines running through Massachusetts and Vermont into Canada, the declaration contained no allegation that White was engaged in interstate commerce at the time of the collision. The Company made this the ground of a plea in bar. The Administratrix thereupon filed a Replication admitting that the deceased was engaged in such commerce at the time of his death. The Company demurred to the Replication on the ground that it was a departure from the cause of action under the state law and the assertion of a new cause of action under the Federal Employers' Liability Law. This demurrer was overruled and after verdict the defendant made the same facts the basis of a motion in arrest of judgment.

The evidence showed a liability under the Employers' Liability Act, and without stopping to discuss whether, on general principles, the motion should not have been overruled because the declaration was amendable to conform to the proof (*Grand Trunk Railway* v. *Lindsay*, 233 U. S. 48; *Toledo, St. L. & Western R. R.* v. *Slavin*, 236 U. S. 454) it is sufficient to say that the Supreme Court of the State held that the defect in the original declaration had been cured by the charge in the plea and the admission in the Replication that White was employed in interstate commerce. That decision on a matter of state pleading and practice is binding on this court.

6. Another assignment relates to the form of the verdict: The administratrix brought suit "for the benefit of the widow and next of kin, minor children." The defendant did not ask the court to instruct the jury to apportion the damages and there was a verdict for the plaintiff for $7,168. The defendant then moved in arrest "because

the verdict of the jury in this case was a general verdict." In this court there was a departure from the language of the exception and error is assigned "because the judgment being *in solido* is void under the Federal Employers' Liability Law for the reason that damages must be apportioned by the jury in accordance with the dependency of the relatives entitled to recover for his death." In support of that contention, the defendant relies on the statement in *Gulf &c. Ry.* v. *McGinnis*, 228 U. S. 176, that "though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss." That statement must be read in the light of the record then before the court. It showed that one of those named as a beneficiary was a married daughter of the deceased living with her husband and supported by him. The jury actually apportioned the damages, so the question as to the validity of a verdict *in solido* was not raised by the record. The quoted language is part of its holding, that it was error to refuse to charge that the married daughter was not a dependent of her deceased father. But there was nothing in that record which would support a ruling that a general verdict was invalid or that the verdict could be set aside because it failed to fix the amount each beneficiary was to receive.

Under Lord Campbell's Act (9 & 10 Vict., ch. 93, § 2) and in a few of the American States the jury is required to apportion the damages in this class of cases. But even in those States the distribution is held to be of no concern to the defendant and the failure to apportion the damages is held not to be reversible error (*Norfolk &c. Ry.* v. *Stevens*, 97 Virginia, 631 (1), 634; *International Ry.* v. *Lehman*, 72 S. W. Rep. 619)—certainly not unless the defendant can show that it has been injured by such

failure. The Employers' Liability Act is substantially like Lord Campbell's Act, except that it omits the requirement that the jury should apportion the damages. That omission clearly indicates an intention on the part of Congress to change what was the English practice so as to make the Federal statute conform to what was the rule in most of the States in which it was to operate. Those statutes, when silent on the subject, have generally been construed not to require juries to make an apportionment. Indeed, to make them do so would, in many cases, double the issues; for, in connection with the determination of negligence and damage, it would be necessary also to enter upon an investigation of the domestic affairs of the deceased—a matter for Probate Courts and not for jurors. If, as in the *McGinnis Case*, the plaintiff sues for the benefit of one who is not entitled to share in the recovery (*Taylor* v. *Taylor*, 232 U. S. 363; *North Carolina R. R.* v. *Zachary*, 232 U. S. 248), and if her inclusion in the suit might increase the amount of the recovery,—the defendant may raise the question, in such mode as may be appropriate under the practice of the court in which the trial is had, so as to secure a ruling which will prevent a recovery for one not entitled to share in the benefits of the Federal act. But no such question was or could have been raised in the present case, since, as matter of law, the wife and minor children were all to be treated as entitled to share in the amount recovered for the death of the husband and father. 35 Stat. 65.

7. Assignments 25 and 27 relate to the refusal of the court to permit testimony as to the delivery and contents of the "clearance card" and the refusal to permit the Railway Company to show that under the Federal law all engines, including 708, had been inspected and found to be in good condition. They both raise questions of general law. They involve no construction of the Federal statute and neither directly nor indirectly affect any

Federal right. Those assignments, therefore, under Jud. Code, § 237; Rev. Stat., § 709, will not be reviewed on a writ of error to a state court. *Seaboard Air Line* v. *Duvall.* See also *Chicago Junction Ry.* v. *King*, 222 U. S. 222 and *Yazoo & Miss. R. R.* v. *Wright*, 235 U. S. 376, which state the rule where similar cases are brought here by writ of error to a Federal court.

Judgment affirmed.

UNITED STATES *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 517. Argued December 9, 10, 1914.—Decided June 21, 1915.

A railroad corporation engaged at the time of the passage of the Hepburn Act in the business of mining, buying, transporting and selling coal, in order to divest itself of title after the coal had been mined and before transportation began, caused a coal company to be incorporated having stockholders and officers in common with itself; thereupon the two corporations having a common management entered into a contract prepared by the railroad company under which the railroad company did not go out of the mining and selling business, but when the coal was brought to the surface it lost title by a sale to the coal company f. o. b. the mines and instantly as carrier regained possession and retained it until delivery to the coal company which subsequently paid the contract price; the price paid was a fixed percentage of the price at a stated terminal on the day of delivery at the mines, and the railroad agreed to sell all of the coal it produced or purchased from others to the coal company and the latter company agreed to buy only from the railroad company and subject to the contract; the stockholders of the railroad company were allowed to take *pro rata* the stock of the coal company and practically all availed of the option, and the coal company declared a dividend on each share of stock sufficient to pay for

the amount of stock allotted to the holder thereof. In a suit brought by the Government alleging that the two corporations were practically one and that the contract was invalid, *held* that:

The Commodity Clause of the Hepburn Act was intended to prevent railroads from occupying the dual and inconsistent position of public carrier and private shipper; and, in order to separate the business of transportation from that of selling, the statute made it unlawful for the carriers to transport in interstate commerce any coal in which the carrier had any interest, direct or indirect.

It is not improper for a carrier engaged in mining coal to institute the organization of a coal company to buy or produce the coal so as to comply with the terms of the Commodity Clause and to give its stockholders an opportunity to subscribe to the stock, but it must dissociate itself from the management of the coal company as soon as the same starts business.

Mere stock ownership by a railroad company or by its stockholders in a producing company is not the test of illegality under the Commodity Clause but unity of management and *bona fides* of the contract between the carrier and the producer.

The Commodity Clause and the Anti-trust Act are not concerned with the interest of the parties, but with the interest of the public; and if a contract between a carrier and a producer is as a matter of law in restraint of trade, or if the producing company is practically the agent of the carrier, the transportation of the article produced by the carrier is unlawful.

The contract in this case enables the railroad company to practically control the output, sales and price of coal and to dictate to whom it should be sold and as such is illegal under both the Commodity Clause and the Anti-trust Act.

In order to comply with the Commodity Clause in regard to the transportation of coal a carrier engaged also in mining coal must absolutely dissociate itself from the coal before the transportation begins, and if it sells at the mouth of the mine, the buyer must be absolutely free to dispose of it and have absolute control, nor should a carrier sell to a corporation managed by the same officers as itself—that is contrary to the policy of the Commodity Clause.

While there might be a *bona fide* and lawful contract between a carrier mining coal and a buying company by which the latter buys all of the coal of the former, the contract to be not illegal must leave the buyer free to extend its business else-

where as it pleases and to otherwise act in competition with the carrier.

213 Fed. Rep. 240, reversed.

THE appellee was chartered not only as a Railroad Company, but was authorized to mine and sell coal. The Commodity Clause of the Hepburn Act of 1906 made it unlawful for the carrier to haul its own coal beyond the limits of the State of Pennsylvania, and desiring to continue the business of mining and transporting coal, the Railroad adopted a plan under which it was to make a sale and divest itself of title to the coal, at the mouth of the mines, before transportation began. Accordingly it caused to be incorporated, under the laws of New Jersey, the Delaware, Lackawanna and Western *Coal* Company with a capital stock of $6,800,000,—divided into shares of $50 each. The Railroad Company then invited its own stockholders to subscribe to the capital stock of the Coal Company at the rate of one share of the latter for each four shares of the former. Ninety-nine per cent. of these stockholders did, as was expected, subscribe for the stock of the Coal Company—their subscriptions being paid for in full out of a cash dividend of $13,600,000 previously declared by the Railroad Company. The new corporation was then organized by electing the Vice-President of the Railroad Company as President of the Coal Company and other officers and directors of the Coal Company were also officers and directors of the Railroad Company.

As soon as the organization was completed, the Railroad Company prepared and submitted to the Coal Company a contract by which the Railroad Company reserving what it needed for its railway locomotives 'agreed to sell and the Coal Company agreed to buy, f. o. b. the mines, all coal which, during the term of the contract, the Railroad Company should produce from its own mines or purchase from any one else.' The price for prepared sizes—the more important commercial coal—was fixed at 65 per

cent. of the price in New York on the day of delivery at the mines. The Railroad Company also leased to the Coal Company all its trestles, docks and shipping facilities.

The contract—thus prepared by the Railroad Company—was then signed by both corporations and, on August 2, 1909, the Coal Company took possession of the leased property; those who had been Agents of the Railroad in its Sales Department became Agents of the Coal Company in its Sales Department and the two corporations, with managing officers in common, also had offices in common in the City of New York.

Thereafter the Railroad Company continued its mining business, annually producing about 7,000,000 tons and purchasing about 1,500,000 tons from operators whose mines were located on its railway. After retaining what was needed for use on its railway engines, it sold the balance, aggregating about 7,000,000 tons, to the Coal Company at the contract prices f. o. b. the mines. The coal thus sold by the Railroad Company was then transported by the Railroad Company to destination where it was delivered to the Coal Company which paid the regular tariff freight rate and the contract prices on the 20th of each month. This course of dealing continued until February, 1913, when the Government filed a Petition, against both corporations, alleging that the two were practically one and attacking the validity of the contract.

The Petition alleged that the coal business was extremely profitable and in order to continue it, in all its branches, the Railroad Company (which was controlled by a group of 25 persons, owning a majority of its stock), had determined "to cause the organization of a new corporation to be under their own control—whose stockholders would be substantially the same as those of the Railroad Company—and through it to conduct the business theretofore carried on by the Railroad Sales Department, thus securing, in effect, the continued unity of

mining, transporting and selling, in substance, as theretofore and depriving the public of the benefits which the Commodity Clause was intended to produce."

The Petition alleged that when the contract was made, in August, 1909, the stockholders of the two corporations were practically identical; that a large majority of the stock in both is still owned by the same persons and that by virtue of the terms and provisions of the contract the Railroad had such an *interest* in the coal as to make it unlawful for it to transport such commodity in interstate commerce.

It was further charged that the transportation of the coal sold to the Coal Company was not only a violation of the Commodity Clause, but that the contract tended to create a monopoly and unlawfully to hinder and restrain trade in coal in violation of the provisions of the Anti-Trust Act. In this connection it was also charged that the Railroad Company not only mined coal, but purchased the product of other mines located along its railway, and had acquired the output of other collieries on its line, giving to it the disposition of more than 90 per cent. of the market, with power to arbitrarily fix prices. The Petition averred:

"By reason of the arrangements described, the support of the Railroad Company, and the peculiar advantages and facilities acquired, the Coal Company at once secured and has ever since maintained an unlawful monopoly of the sale of coal produced along defendant's railroad, and has completely dominated the markets at all points thereon not reached by any other railroad. Its position, power, and support render effective competition with it practically impossible, and the monopoly which it now holds will continue indefinitely unless restrained."

Both defendants answered. There was practically no dispute as to the facts, though both corporations contended that the facts alleged and proved did not support

the legal conclusions sought to be drawn therefrom by the Government. Each insisted that the two corporations were separate in law and in fact; contended that the Railroad Company had no interest in the coal and insisted that the Coal Company acted independently of the Railroad Company and was not subject to its control.

At the hearing there was evidence that at the date of the making of the contract all except 2,249 shares in the Coal Company were held by those who held stock in the Railroad Company. By reason of sales of both stocks, it appeared that in October, 1913, 88,116 shares of the Railroad stock were held by those who were not then interested in the Coal Company and 6,907 shares of stock in the Coal Company were held by those who were not owners of the Railroad stock.

There was also evidence that many of the officers of the Coal Company were not officers of the Railroad Company; that the management of the two corporations was separate and distinct; that the Coal Company kept its own books, deposited its funds in its name in banks of its own choosing, and that the profits went solely to its own stockholders. The Coal Company paid the same rates of freight and demurrage as other shippers and received no discriminating favors from the Railroad Company. In 1910 the amount paid to the Railroad for the purchase price of coal under the contract was about $20,000,000, and for the freight thereon about $14,000,000. Since the contract was made the Coal Company has bought coal from other persons, the quantity being 3,847 tons in 1909; 2,267 tons in 1910; 6,600 tons in 1911; 92,004 tons in 1912; 310,645 tons in the first ten months in 1913.

There are about 70,000,000 tons of anthracite coal produced annually of which 20,000,000 tons are sold at tidewater. Of the 7,000,000 tons sold by the Delaware, Lackawanna and Western Railroad Company about

2,000,000 tons are transported to tidewater points and of this 500,000 tons are prepared sizes. The Coal Company at large expense bought land, built trestles and storage facility at various points in addition to those leased to it by the Railroad Company.

The District Court held that the business of the two corporations had not been so commingled as to make their affairs indistinguishable; that they are two distinct and separate legal beings actually engaged in separate and distinct operations and that the Railroad does not own the coal, either in whole or in part, during its carriage but has in good faith dissociated itself therefrom before the beginning of the act of transportation.

In answer to the claim that 'the Railroad will be the gainer from a high price at tide, since this will necessarily increase the price at the mines and therefore that this interest in the price is such an interest in the coal itself as is condemned by the statute,' the court said: "Undoubtedly it is correct to say that the Railroad has an interest in the price, but that 'interest' merely means that the Railroad will gain by a higher price at tide and does not mean that the Railroad has power to control the coal or the price for which it sells." The alleged power to increase the price by increasing the freight was held to be ineffective because freight rates were controlled by the Commerce Commission. "The Railroad Company does not fix prices. It does not decide how much coal is to go to New York Harbor, and it does not determine the sum for which the coal is to be sold at that point." 'The 65 per cent. basis had its origin many years ago and affords a convenient basis for calculating the price to be paid for future deliveries.' . . . The Railroad retains nothing more after the title passes to the Coal Company at the mines than an interest in the price and this is not the same thing as an interest in the coal. The Commodity Clause deals with an "in-

terest direct or indirect" in the commodities themselves and this must mean some kind or degree of ownership in the thing transported or some power to deal with it or to control it. The Railroad Company neither owns nor controls the coal after it has been loaded on the cars at the breakers. Thereafter the Coal Company is the owner and the master, and fixes prices, routes and destination at its own will.

The court further said that 'the bill of complaint makes a formal charge against both defendants under the Anti-Trust Act, but the oral argument left us under the impression that this charge was not much insisted on. For that reason the Anti-Trust Branch of the complaint was regarded as comparatively unimportant, and for that reason we shall not undertake what we think would be the needless task of discussing the evidence bearing upon the charge of restraining or monopolizing commerce. If we are mistaken in this supposition the error can easily be corrected.'

The Petition was thereupon dismissed without prejudice to the Government's right to begin a second proceeding whenever it may be so advised. 213 Fed. Rep. 240. The Government then brought the case here by appeal.

In the Government's brief it is stated that while it did not now ask for a ruling as to the right of the Railroad Company to purchase and sell coal produced in mines along its Railroad, it did ask that if the decree was affirmed it should be without prejudice to the right of the United States to institute such proceedings.

Mr. Assistant to the Attorney General Todd and *Mr. Solicitor General Davis* for the United States:

The Railroad Company, whilst continuing to transport in interstate commerce anthracite coal mined and purchased by it, has not in good faith dissociated itself

therefrom before the transportation, and therefore is continuing to violate the Commodities Clause.

The contract of August 2, 1909, between the Railroad Company and the Coal Company restrains interstate trade and commerce in violation of the Federal Anti-Trust Act.

In support of these contentions, see Att'y Gen'l's Rep. 1912; *Attorney General* v. *Gt. Nor. Ry. Co.*, 29 Law Jour. (N. S. Eq.) 794; *Del., Lack. & West. R. R.* v. *United States*, 231 U. S. 363; *New Haven R. R.* v. *Int. Com. Comm.*, 200 U. S. 361; *Nor. Securities Co.* v. *United States*, 193 U. S. 197; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Tap Line Cases*, 234 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Del. & Hud. Co.*, 164 Fed. Rep. 215; *S. C.*, 213 U. S. 266; *United States* v. *Lehigh Valley R. R.*, 220 U. S. 257; *United States* v. *Union Pacific R. R.*, 226 U. S. 61, and 470. See also 26 Stat. 209, c. 647; 32 Stat. 823, c. 544; 34 Stat. 584, c. 3591; 36 Stat. 854, c. 428.

Mr. William S. Jenney for appellee Railroad Company and *Mr. John G. Johnson* for appellee Coal Company:

The appellees do not maintain a monopoly in the production or sale of coal as alleged in the petition.

The Railroad Company, by a sale of its coal under the terms of the contract in issue to the Coal Company, has in good faith dissociated itself from such coal before transportation.

The contract in issue does not restrain interstate commerce.

In support of these contentions, see Att'y Gen'l's Rep., 1909, p. 57; *Id.*, 1912, p. 23; *Ansbro* v. *United States*, 159 U. S. 695; *Del., Lack. & W. R. R.* v. *United States*, 231 U. S. 363; *Paraiso* v. *United States*, 207 U. S. 368; *Rodriguez* v. *Vivoni*, 201 U. S. 371; *Rogers* v. *Ritter*, 12 Wall. 317; *United States* v. *Am. Bell Tel. Co.*, 167 U. S. 224;

United States v. *Cent. R. R. of N. J.*, 220 U. S. 275; *United States* v. *Del., Lack. & W. R. R.*, 213 Fed. Rep. 240; *United States* v. *Del. & Hudson Co.*, 213 U. S. 366; *United States* v. *Erie R. R.*, 220 U. S. 275; *United States* v. *Lehigh Valley R. R.*, 220 U. S. 257; *United States* v. *Pennsylvania R. R.*, 220 U. S. 275; *United States* v. *Reading Co.*, 226 U. S. 324, and 228 U. S. 158.

MR. JUSTICE LAMAR, after making the foregoing statement of facts, delivered the opinion of the court.

The Commodity Clause of the Hepburn Act was intended to prevent railroads from occupying the dual and inconsistent positions of public carrier and private shipper; and, in order to separate the business of transportation from the business of selling, that statute made it unlawful for railroads to transport in interstate commerce any coal in which the company had "*any interest, direct or indirect.*" [1] *United States* v. *Delaware & Hudson*, 213 U. S. 415; *Delaware &c. R. R.* v. *United States*, 231 U. S. 363, 371.

As will be seen from the statement of facts, the Delaware, Lackawanna and Western Railroad Company was at the time of the passage of the Hepburn Act of 1906, one of the great coal roads engaged in the fourfold business of mining, buying, transporting and selling coal. As the Commodity Clause made it unlawful to transport its own coal to market, the Railway Company decided to adopt a plan by which to divest itself of title after it had

[1] "From and after May 1, 1908, it shall be unlawful for any railroad company to transport" [in interstate commerce] "any article or commodity other than timber . . . manufactured, mined or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." 34 Stat. 585.

been mined but before transportation began. It thereupon caused a Coal Company to be incorporated having stockholders and officers in common with the Railroad Company. The two corporations, thus having a common management, then made a contract—prepared by the Railroad Company—under which the Railroad Company did not go out of the mining and selling business, but when the coal was brought to the surface the Railroad Company lost title by a sale to the Coal Company f. o. b. the mines and instantly regained possession as carrier. It retained that possession until delivery to the Coal Company, which subsequently paid therefor at the contract price.

The District Court held that it was illegal for the same person to own a majority of the stock in the two corporations and that their contract of sale was lawful.

From the decree, dismissing the Bill, the Government appealed to this court where much of the argument was directed to the question as to whether the fact that the two corporations had practically the same shareholders left the Railroad Company in a position where it could lawfully transport coal which it had sold at the mouth of the mine to the Coal Company.

1. But mere stock ownership by a Railroad, or by its stockholders, in a producing Company cannot be used as a test by which to determine the legality of the transportation of such Company's coal by the interstate carrier. For, when the Commodity Clause was under discussion, attention was called to the fact that there were a number of the anthracite roads which at that time owned stock in coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such Road to transport coal belonging to such Company. The amendment, however, was voted down; and, in the light of that indication of Congressional intent, the Commodity Clause was construed to mean that it was not necessarily

unlawful for a railroad company to transport coal belonging to a Corporation in which the Road held stock. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 414. For a stronger reason, it would not necessarily be illegal for the Road to transport coal belonging to a Corporation whose stock was held by those who owned the stock of the Railroad Company.

Nevertheless, the Commodity Clause, of the Hepburn Act of 1906, rendered unlawful many transactions which prior to that time had been expressly authorized by the statutes of the States which had chartered the Coal Roads. And, while the Hepburn Act provided that, in the future, interstate railroads should not occupy the dual position of carrier and shipper, there was, of course, no intent on the part of Congress to confiscate property or to destroy the interest of the stockholders. But, still, upon adoption of the Commodity Clause, this appellee Railroad was confronted with a difficult situation. To shut down the mines, because the coal could not be transported, would have meant not only a vast monetary loss to the Company and its stockholders, but would have been even more harmful to the interests of the public which required a constant supply of fuel. The character of coal property was such as to make it impossible to divide the same in kind among the railroad stockholders, while the value of the coal land was so great as to make it impracticable to find a purchaser in ordinary course of trade. It was, therefore, natural, if not necessary, to organize a corporation with which a contract could be made, and out of cash received or stock issued to pay for or preserve the equity which the railroad shareholders had in the coal.

In this situation there may have been no impropriety in the Railroad Company taking the preliminary steps of organizing such a corporation. Neither was it illegal for the stockholders of the Railroad Company to take stock in the Coal Company, for there are many instances

in which the law recognizes that there may be diversity of corporate interest even when there is an identity of corporate members. A city and the county, in which it is located, may both have the same population but different corporate interests. Many private corporations have both stockholders and officers in common, yet they may nevertheless make contracts which will bind both of the separate entities. But whenever two such companies, thus owned or managed, make contracts which affect the interest of minority stockholders, or of third persons, or of the public the fact of their unity of management must be considered in testing the validity and *bona fides* of the contracts under review.

2. That principle is to be specially borne in mind in the present case. For this is not an instance of a Coal Road and a Coal Company, both of which existed and had made contracts prior to the Commodity Clause;—but a case where a Coal Company was created with the express purpose that, with stockholders in common, it should be a party to a contract intended to enable the Railroad Company to meet the requirements of the Commodity Clause and at the same time continue the business of buying, mining, selling and transporting coal.

It is also to be noted that the Delaware, Lackawanna and Western Railroad Company did not part with title to its coal lands, mines and mining machinery as seems to have been done, on terms not fully stated [*United States* v. *Delaware & Hudson*, 213 U. S. 366, 398 (5), 392], in some of the instances discussed in the Commodity Cases. In them the ownership of the mines had passed completely from the railroads to the producing companies and the coal property was no longer subject to the debts of the railroad companies. After such sale of the coal lands there was both a technical and a practical separation of the legal interest of the two corporations in the coal under the ground, on the surface, when it was transported, and

when it was sold. The fact that the Railroad held stock in the producing company, and received dividends thereon, did not give to the Railroad Company, any more than to any other stockholder in any other corporation, a legal interest in the property of the Coal Company. Nor would the fact that the Railroad Company had once owned it, have made any difference, if,—by a normal and *bona fide* sale at the point of production,—the carrier had lost all power of control and all right, title and interest in the coal before the transportation began. *United States* v. *Delaware & Hudson*, 213 U. S. 413, top.

3. But the decisions construing the statute, recognize that one corporation can be an agent for another corporation and that by means of stock ownership one of such companies may be converted into a mere agent or instrumentality of the other. *United States* v. *Lehigh Valley R. R.*, 220 U. S. 257, 273. And, this use of one by the other—or this power of one over the other—does not depend upon control by virtue of the fact that stock therein is held by the Railroad Company or by its shareholders. For dominance of the Coal Company may be secured by a carrier (*New Haven R. R.* v. *Int. Com. Comm.*, 200 U. S. 363) not only by an express contract of agency, but by any contract which in its practical operation gives to the Railroad Company a control or an "interest, direct or indirect" in the coal sold, at the mouth of the mines.

Assuming then that the incorporation and organization of the Coal Company under the auspices of the Railroad Company was legal; assuming that the election of railroad officers as the first managers of the Coal Company was not illegal; assuming that as officers of the Railroad they could contract with themselves as officers of the Coal Company; assuming that at the time of organization it was not unlawful for the Railroad Company and the Coal Company, not only to have officers but offices in common, and finally assuming that all these

facts together did not, in and of themselves, establish an identity of corporate interest, still these facts taken together are most significant. They at least prove that the relation between the parties was so friendly that they were not trading at arm's length. And the further fact that one of the parties was under a statutory disability as to hauling coal makes it necessary to carefully scrutinize their arrangement in order to determine whether it was a *bona fide* and lawful contract of sale, or a means by which the Railroad though parting with the legal title retained an interest and control in what had been sold.

4. That contract is published in full in 213 Fed. Rep. 255–259. The provisions material in the present inquiry may be thus summarized:

(a) The Railroad Company agreed to sell and the Coal Company agreed to buy all of the coal mined or acquired by the Railroad Company during the continuance of the contract; (b) the price for the more important commercial grades was to be 65 per cent. of the New York price on the day of delivery; (c) the amount of coal to be sold and delivered was at the absolute option of the Railroad Company as its interests might determine; (d) the Coal Company was not to buy coal from any other person or corporation without the written consent of the Railroad Company; (e) the Coal Company was to conduct the selling of the coal so as best to conserve the interests, good-will and markets of the coal mined by the Railroad Company; (f) the Coal Company was to continue to fill the orders of present responsible customers of the Railroad Company, even if some of such sales might be unprofitable; (g) the Railroad leased to the Coal Company all of its trestles, docks and shipping facilities at a rental of 5 per cent. of their value; (h) the contract could be terminated by either party on giving six months' notice.

The most cursory examination of the contract shows that—while it provides for the sale of coal before transportation begins—it is coupled with onerous and unusual provisions which make it difficult to determine the exact legal character of the agreement. If it amounted to a Sales Agency the transportation was illegal because the Railroad Company could not haul coal which it was to sell in its own name or through an agent. If the contract was in restraint of trade it was void because in violation of the Sherman Anti-Trust Law. The validity of the contract cannot be determined by consideration of the single fact that it did provide for a sale. It must be considered as a whole and in the light of the fact that the sale at the mine, was but one link in the business of a Railroad engaged in buying, mining, selling and transporting coal.

5. By virtue of the fact that the Railroad Company bought, mined and sold, it—like any other dealer—was interested in maintaining prices, since the contract did not fix a definite sum to be paid for all of the coal sold, but provided that the Railroad Company was to receive 65 per cent. of the New York price on the day the coal was loaded into the cars. The higher the rate in New York the better for the seller. And, by the contract, the Railroad reserved a power which, when exercised, could not only curtail production but shipments. Thus by decreasing the amount transported the supply in New York could be lessened. This would tend to raise New York prices and thus increase the sum the Railroad was to receive.

The Railroad Company was in the business of selling, and it is not to be presumed that its power to limit deliveries or to prevent the Coal Company from obtaining coal elsewhere would be often exercised. Yet the power did exist and it was reserved for some purpose—not, as argued, to prevent controversy as to failure to deliver

in cases of strikes or accidents, for such is not the language or intent of the contract. Nor is room left for the implication [necessary to the validity of such an exclusive contract, *Chicago &c. R. R.* v. *Pullman*, 139 U. S. 80 (3), 89, 90], that the seller would deliver reasonable amounts at reasonable times. All such defensive arguments are excluded by the express and emphatic terms of the contract that "the amount of coal to be so delivered and sold to the buyer by the seller shall be at the absolute option of the seller as its interests may determine, and the seller shall be subject to no liability whatsoever for failure to supply the buyer with such amount of coal as it may desire."

It might be said that if such a power was exercised the Coal Company could then go into the market and purchase from other coal dealers. But this contract deprives the buyer even of that ordinary business privilege, declaring that the Coal Company "will purchase all coal to be sold by it from the seller, and will purchase no coal from any other person or corporation, except with the written consent of the seller."

6. Reading these two clauses together, it is evident that the Coal Company was neither an independent buyer nor a free agent. It was to handle nothing except the Railroad's coal and was the instrument through which the Railroad sold all its product. The Coal Company, though incorporated to do a general coal business, was dependent solely upon the Railroad for the amount it could procure and sell and was absolutely excluded from the right to purchase elsewhere without the consent of the Railroad Company, which, however, was under no corresponding obligation to supply any definite amount at any definite date.

Restrictive contracts should at least be reciprocal and mutual—for if A is bound to purchase only from B the latter should certainly be bound to furnish what A wishes to buy [*Chicago &c. R. R.* v. *Pullman*, 139 U. S. 80

(3), 89, 90]—especially is this true when the subject of the contract is an article in which the public is interested. Even at common law, in passing upon the validity of contracts in restraint of trade, the "public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires the contract may be sustained." *Gibbs* v. *Baltimore Consolidated Gas Co.*, 130 U. S. 396, 409; *Fowle* v. *Park*, 131 U. S. 97.

In this case the subject of the contract was anthracite coal—an article of public necessity and of limited supply, one-tenth being controlled by the appellee. The Railroad Company might have justly insisted on contract provisions intended to secure payment for all that it produced. But going beyond what was required for its own protection, it restrained the Coal Company from buying from anyone else, and,—what is probably more significant in this case—thereby prohibited the Coal Company from competing with the Railroad Company for the purchase of coal mined on the Railroad lines. And, this was not a mere perfunctory provision, because the Railroad Company was a buyer of coal and purchased 1,500,000 tons per annum from mines on its system. By this contract it excluded from that market the Coal Company, which, with its capital of $6,000,000, could have been a strong competitor. Such a provision may not have actually effected a monopoly. But considering the financial strength of the carrier; its control of the means of transportation; its powers to fix the time when transportation of the very coal sold was to begin; its power in furnishing cars to favor those from whom it bought or to whom it sold—such a contract would undoubtedly have that tendency. In that respect it was opposed to that policy of the law, which was the underlying reason for the adoption of the Commodity Clause. *New Haven R. R.* v. *Int. Com. Comm.*, 200 U. S. 373.

7. There is another provision of the contract which shows that the Railroad had such an interest in the coal as enabled it to dictate to whom it should be sold, even at unprofitable prices. The agreement provides:

"Sixth. The buyer agrees that it will conduct the business of selling the coal of the seller in such manner as best to conserve the interests of and preserve the good will and markets of the coal mined by the seller, and to continue to fill the orders of all responsible present customers of the seller even though as to some of such customers the sales may be unprofitable, it being understood and agreed that at the prices above quoted the entire business of the buyer will be conducted at a profit."

This is not a mere stipulation that the Coal Company would not injure the reputation of the Railroad Company's coal; while the further provision that the Coal Company would 'continue to fill the orders of all responsible present customers, even though some of such sales might be unprofitable,' was a further indication of the fact that both parties recognized the Railroad had an interest in the coal and used the Coal Company to preserve and secure that interest even after transportation began.

The unusual, onerous and restrictive terms imposed by this contract may, as between the parties, have been negligible—certainly so as long as the stockholders remained the same, since a loss to the Coal Company would be presumably represented by a gain to the Railroad Company. But the Commodity Clause and the Anti-Trust Act are not concerned with the interest of the parties but with the interest of the public and it, therefore, makes no difference whether this contract dictated by the Railroad Company was for the permanent advantage of the Coal Company.

8. It is argued, however, that the contract has not operated to the injury of the parties or of the public.

And, in answer to those urged by the Government, it is said that some of the objections now insisted on were not pressed in the lower court; that there is no complaint that the Railroad charged the Coal Company exorbitant prices; or, that it ever raised the New York prices; or, that it failed to make prompt deliveries; or, that it has prevented the Coal Company from buying coal from other operators; or, that the Railroad monopolized the coal mined on its railway, or that it deprived such mining companies of an open market. From this it is argued that the present objections to the contract are purely academic. But its validity depends upon its terms. And if, as a matter of law, the contract is in restraint of trade, or, if the Coal Company is practically the agent of the Railroad Company then the transportation of the coal by the latter is unlawful.

9. As already pointed out, the contract has in it elements of a sale and elements of a sales agency. It provides that the Railroad Company will sell and that the Coal Company will buy all coal that is mined during the continuance of the contract; but it prevents the Coal Company from buying from any one else. It requires it to sell to present railroad customers at the old price, even though those prices may be unprofitable. The seller is not bound to make deliveries of fixed quantities at fixed dates and by decreasing what it will sell and determining when it will ship it has a power in connection with its power as a carrier, which, if exerted, would tend to increase prices in New York. Besides all this, the contract prevents the Coal Company from competing with the Railroad Company in the purchase of coal along the railway line. Taking it as a whole and bearing in mind the policy of the Commodity Clause to dissociate the Railroad Company from the transportation of property in which it is interested and that the Sherman Anti-Trust Act prohibits contracts in restraint of trade,

there would seem to be no doubt that this agreement violated both statutes.

10. The Railroad Company, if it continues in the business of mining, must absolutely dissociate itself from the coal before the transportation begins. It cannot retain the title nor can it sell through an Agent. It cannot call that Agent a buyer while so hampering and restricting such alleged buyer as to make him a puppet subject to the control of the Railroad Company. If the Railroad sells coal at the mouth of the mines to one buyer or to many it must not only part with all interest direct or indirect in the property but also with all control over it or over those to whom the coal is sold at the mines. It must leave the buyer as free as any other buyer who pays for what he has bought. It should not sell to a corporation with officers and offices in common,—for the policy of the statute requires that instead of being managed by the same officers, they should studiously and in good faith avoid anything, either in contract or conduct, that remotely savors of joint action, joint interest or the dominance of one Company by the other. If the seller wishes—by a lawful and *bona fide* contract, whose provisions as to delivery and otherwise are not in restraint of trade—to sell all of its coal to one buying company, then that one buyer can be bound by reasonable terms and required to pay according to the contract. But such buyer should otherwise be absolutely free to extend its business to buy when, where and from whom it pleases, and otherwise to act as an independent dealer in active competition with the Railroad Company.

What has been said is sufficient to show that the contract was invalid. That makes it unnecessary to discuss other questions raised but not disposed of by the District Court, and the decision herein is without prejudice to the right of the United States to institute proceedings

in reference thereto or to test the right of the Railroad Company to purchase coal for sale.

The decree is reversed with directions to enter a decree enjoining the Railroad from further transporting coal sold under the provisions of the contract of August 2, 1909, referred to in the Petition.

Reversed.

MR. JUSTICE MCREYNOLDS took no part in the decision of this case.

NEWMAN v. UNITED STATES EX REL. FRIZZELL.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 813. Argued April 13, 1915.—Decided June 21, 1915.

In *quo warranto* proceedings brought in the name of the United States on the relation of a citizen and taxpayer of the District of Columbia for the purpose of ousting from the office of Civil Commissioner of the District one appointed by the President and confirmed by the Senate on the ground that he was not, as required by the Act of June 11, 1878, c. 180, § 1, 20 Stat. 103, an actual resident of the District of Columbia for three years next preceding his appointment, *held* that:

In early days usurpation of office was treated as a crime, and could be prosecuted only as such and by duly authorized prosecuting officer and a private citizen could not prosecute such a proceeding.

Subsequently after modification of the criminal features, the writ of *quo warranto* came to be used as a means of determining which of two claimants was entitled to an office.

Under the District Code of 1902 *quo warranto* is not limited to proceedings against municipal officers, but extends to all persons in the District exercising any office, civil or military; these provisions never having been judicially interpreted heretofore, this

case must be determined according to the special language of that Code in the light of general principles applicable to *quo warranto*.

Owing to the many reasons of public policy against permitting a public officer to be harassed with litigation over his right to hold office, Congress has not authorized, but has placed obstacles in the way of, a private citizen on his own motion to attack an incumbent's title to office.

Under the District of Columbia Code a third person may not institute *quo warranto* proceedings without the consent of the law officers of the Government and also of the Supreme Court of the District.

The District Code makes a distinction between a "third person" and an "interested person" in maintaining *quo warranto* proceedings.

While every citizen and every taxpayer is interested in the enforcement of law and in having only qualified officers execute the law, such general interest is not a private but a public interest, which is not sufficient to authorize the institution of *quo warranto* proceedings.

The mere fact that one is a citizen and taxpayer of the District of Columbia does not make him an interested party who may maintain *quo warranto* proceedings against the incumbent of an office on the consent of the court, although the law officers of the Government refuse such consent.

An interested person within the meaning of the provisions of the District Code in regard to *quo warranto* proceedings is one who has an interest in the office itself peculiar to himself whether the office be elective or appointive.

Unless the right to maintain *quo warranto* proceedings under the District Code were limited to persons actually and personally interested, every officer attached to the Government at Washington would be subject to attack by persons having no claim in the office or interest therein different from that of every other citizen and taxpayer of the United States.

As §§ 1538–1540, Code District of Columbia, apply to actions in *quo warranto* instituted by authorized parties against National officers of the United States, they are general laws of the United States and not merely local laws of the District of Columbia, and the judgment of the Court of Appeals of the District construing those sections is reviewable by this court under § 250, Judicial Code.

43 App. D. C. 53, reversed.

THE President, on June 23, 1913, nominated Oliver P. Newman as Civil Commissioner of the District of Columbia. The nomination was referred to a standing committee of the Senate. Certain persons filed objections to the confirmation on the ground that 'Newman had not been an actual resident of the District for three years immediately prior to his nomination' and, therefore, was not qualified to hold the office under the provision of the act of June 11, 1878 [1] (20 Stat. 103, § 1).

At the hearing before the Committee there was testimony that Newman, who was a newspaper correspondent, came to Washington in March, 1910, with the intention of becoming a resident of the District. He rented an apartment in which he resided until the opening of the Presidential Campaign, in the summer of 1912. He was then assigned to newspaper work which took him out of the city. He accepted the employment upon the understanding that it was a temporary arrangement and that he was to return to Washington as soon as the campaign was over. In the discharge of his duties as correspondent he was absent in Chicago and other places until the inauguration. He then returned to Washington and was there living when on June 23, 1913, he was appointed one of the Civil Commissioners of the District. The Committee made a favorable report and he was then confirmed by the Senate.

Thereafter William J. Frizzell called the attention of the Attorney General and the District Attorney to facts which, he insisted, 'proved that Newman had not been an actual resident of the District for three years next preceding his nomination.' On the basis of such facts

[1] "The two persons appointed from civil life shall, at the time of their appointment, be citizens of the United States, and shall have been actual residents of the District of Columbia for three years next before their appointment, and have, during that period, claimed residence nowhere else, . . ."

he requested those officers to institute *quo warranto* proceedings for the purpose of ousting Newman from the office. Both officers declined the request and thereupon Frizzell, alleging himself to be a citizen and a taxpayer of the District, applied to the Supreme Court of the District for permission to use the name of the Government in *quo warranto* proceedings. The court granted the request and thereupon this case of the "*United States* on the relation of *William J. Frizzell* v. *Oliver P. Newman,*" was instituted.

The Respondent demurred on many grounds, among others, that Frizzell was not an interested person and that the court could not go behind the finding of the President and of the Senate that Newman was qualified. The demurrer was overruled and the case submitted to the jury to decide the question of fact as to Newman's residence. Testimony was taken explanatory of his absence from Washington on newspaper work. The court, among other things, charged the jury that there was a difference between "legal residence" and "actual residence." Under the charge, the jury found against Newman. The judgment ousting him from the office was affirmed by the Court of Appeals of the District—one judge dissenting.

The case is here on a writ of error which raises several important questions which, however, cannot be decided if, under the laws of the District of Columbia, Frizzell, as a private citizen was not authorized to institute this proceeding to test the title to a public office to which he himself made no claim.

Mr. Jackson H. Ralston and *Mr. John W. Davis*, with whom *Mr. Wm. E. Richardson*, *Mr. George W. Hott* and *Mr. Conrad H. Syme* were on the brief, for plaintiff in error:

The relator was not an interested party within the meaning and intent of the statute.

A mere taxpayer is not an interested person, the contest being as to a public office.

It was not the intention of Congress that appointees to office, exercising their functions in the District of Columbia, should be subject to *quo warranto* at the suit of a district citizen or taxpayer.

The courts have no right to review presidential and senatorial determination of the qualifications of an officeholder.

The courts below disregarded presidential and senatorial action as without even evidential value in the *quo warranto* proceeding.

Newman possessed the statutory qualifications of a Commissioner of the District of Columbia.

See extracts from chapter 51, D. C. Code, on *quo warranto* and the statute relating to the same and also statutes of various States prohibiting *quo warranto* by private individuals and numerous authorities of this and other courts supporting these contentions.

Mr. Joseph W. Bailey, with whom *Mr. Arthur A. Birney* and *Mr. William J. Neale* were on the brief, for defendant in error:

This court has no jurisdiction as there was not drawn in question the construction of a law of the United States; or the validity of any authority exercised under the United States; or the existence or scope of any power or duty of an officer of the United States; or the jurisdiction of the trial court.

The right to institute *quo warranto* proceedings against a municipal officer whose qualifications are defined by positive law, is not confined to the Attorney General and District Attorney, but may be allowed by a judge of the Supreme Court of the District of Columbia on the application of an interested person after refusal of the law officers to take action. *Torbert* v. *Bennett*, 24 Wash. Law

Rep. 149, 156; Code, §§ 1538–1544; *Union Pac. R. R.* v. *Hall*, 91 U. S. 343, decided 1875; *Downing* v. *Ross*, 1 App. D. C. 251, 253; High on Ex. Rem., App. A.

A citizen taxpayer has such interest in the office of Commissioner of the District of Columbia that he must be regarded as a person interested and entitled to apply for a *quo warranto* in respect to that office. *Mitchell* v. *Tolan*, 4 Vroom, 195, 199; *Richards* v. *Hammer*, 42 N. J. L. 435; *Hann* v. *Bedell*, 67 N. J. L. 148; *Waterbury* v. *Martin*, 46 Connecticut, 479; *State &c.* v. *Vail*, 53 Missouri, 97, 110; *Davis* v. *Dawson*, 90 Georgia, 817; *Covatt* v. *Mason*, 101 Georgia, 246; *State* v. *Kohnke*, 109 Louisiana, 838; overr'g 23 La. Ann. 25; *White* v. *Barker*, 116 Iowa, 96; *Foard* v. *Hall*, 111 N. Car. 369; *Pike County* v. *Metz*, 11 Illinois, 202; *Keliher* v. *Fordyce*, 115 Wisconsin, 608; *William* v. *Samuelson*, 131 Wisconsin, 499; *Barton* v. *Londoner*, 13 Colorado, 303, 314; *Commonwealth* v. *Meeser*, 44 Pa. St. 341. See also English decisions in harmony herewith. *King* v. *White*, 5 Ad. & E. 613; *King* v. *Parry*, 6 Ad. & E. 810; *Queen* v. *Quayle*, 11 Ad. & E. 508.

But every citizen of a town has an interest in its municipal offices which will support a *quo warranto* to test the right of an incumbent thereto. 7 Lawson's Rights, Rem. & Proc., § 4012. See also High on Ex. Rem., §§ 701, 702; Paine on Elections, § 873; Throop on Pub. Officers, § 781; *State* v. *Dahl*, 69 Minnesota, 108; *Davis* v. *City Council*, 90 Georgia, 821.

Confirmation by the Senate of an appointment by the President does not bar judicial inquiry into eligibility of the appointee under the act of Congress which created the office. *Fox* v. *McDonald*, 21 L. R. A. 529, 535, 536.

The right of choice was confined to a class, and persons not within that class were and are disqualified from holding the office and discharging the functions of Civil Commissioner. The writ here is not directed against the Executive, but seeks to oust the respondent as one dis-

qualified by law to receive the executive appointment. Congress has declared that the alien or the non-resident may not exercise the functions of that particular office.

The appointment and confirmation do not establish qualifications which did not exist and render the appointee capable to receive appointment whom the statute disqualifies from receiving it. The Floyd Acceptances, 7 Wall. 666, 676; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The eligibility of one to hold the governorship of a State to which he had been elected was inquired into by *quo warranto* by the Supreme Court of Wisconsin. *Atty. Gen.* v. *Barstow*, 4 Wisconsin, 567; High on Ex. Rem., § 634; *Atty. Gen.* v. *Vail*, 53 Missouri, 97, 108.

The cause was properly submitted to the jury. An instructed verdict for respondent was impossible under the evidence.

The issue of actual residence for three years was submitted to the jury under instructions which embodied all the principles contended for by appellant in his prayers directed to that subject, and were more favorable than he was entitled to have them. He did not except to the charge as given.

In the light of the verdict we hesitate to discuss the distinctions between "residence," actual residence and "domicile," for Mr. Newman's actual absence was conceded, and his claim of intention to return, as a substitute for presence in the District was negatived by the verdict.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

1. Usurpation of a public office, from an early day was treated as a crime and, like all other crimes, could be prosecuted only in the name of the King by his duly authorized law officers. When a judgment was obtained against the intruder he was not only ousted from his office

but fined for his criminal usurpation. A private citizen could no more prosecute such a proceeding in his own name than he could in his own name prosecute for the crime of murder—even though the victim was his near kinsman.

2. But in time the criminal features were modified and it was recognized that there might be many cases which—though justifying *quo warranto* proceedings—were not of such general importance as to require the Attorney General to take charge of the litigation. This was especially true in reference to the usurpation of certain municipal offices named in 9th Anne, ch. 20. By that act, passed in 1710, it was therefore provided that it should be lawful "for the proper officer by leave of the court to exhibit an information in the nature of a *quo warranto at the relation of any person desiring to prosecute the same*" against the designated municipal officers. The writ thus came to be used as a means of determining which of two claimants was entitled to an office, but continued to be so far treated as a criminal proceeding as to warrant not only a judgment of ouster, but a fine against the respondent if he was found to have been guilty of usurpation. *Standard Oil Co.* v. *Missouri*, 224 U. S. 282. This quasi-criminal act was adopted in some of the American States and formed the basis of statutes in others. It does not seem ever to have been of force in any form in the District of Columbia. *Torbert* v. *Bennett*, 24 Wash. Law Rep. 156.

In 1902 Congress adopted a District Code, containing a Chapter on *quo warranto* which though modeled after the English statute differed therefrom in several material particulars. The writ was treated as a civil remedy; it was not limited to proceedings against municipal officers, but to *all* persons who in the District exercised *any office, civil or military*. It was made available to test the right to exercise a public franchise, or to hold an office in a private corporation. Instead of providing that "*any person desiring to prosecute*" might do so with the consent

of the court, certain restrictions were imposed and one enlargement of the right was made. These provisions [1] have never received judicial interpretation. This case must, therefore, be determined according to the special language of that Code, in the light of general principles applicable to *quo warranto*—the prerogative writ by which

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[1] SEC. 1538. Against Whom Issued.—A *quo warranto* may be issued from the Supreme Court of the District in the name of the United States—

First. Against a person who usurps, intrudes into, or unlawfully holds or exercises within the District a franchise or public office, civil or military, or an office in any domestic corporation.

Second. Against any one or more persons who act as a corporation within the District without being duly authorized, or exercise within the District any corporate rights, privileges, or franchises not granted them by the laws in force in said District.

And said proceedings shall be deemed a civil action.

SEC. 1539. *Who may institute.*—The Attorney General or the District Attorney may institute such proceedings on his own motion, or on the relation of a third person. But such writs shall not be issued on the relation of a third person, except by leave of the court, to be applied for by the relator, by a petition duly verified, setting forth the grounds of the application, or until the relator shall file a bond with sufficient surety, to be approved by the Clerk of the court, in such penalty as the court may prescribe, conditioned for the payment by him of all costs incurred in the prosecution of the writ in case the same shall not be recovered from and paid by the defendant.

SEC. 1540. *If Attorney General and District Attorney Refuse.*—If the Attorney General and the District Attorney shall refuse to institute such proceedings on the request of a person interested, such person may apply to the court by verified petition for leave to have said writ issued; and if in the opinion of the court the reasons set forth in said petition are sufficient in law, the said writ shall be allowed to be issued by any attorney, in the name of the United States, on the relation of said interested person, on his compliance with the condition prescribed in the last section as to security for costs.

SEC. 1541. *Relator Claiming Office.*—When such proceeding is against a person for usurping an office, on the relation of a person claiming the same office, the relator shall set forth in his petition the facts upon which he claims to be entitled to the office.

the Government can call upon any person to show by what warrant he holds a public office or exercises a public franchise.

3. The District Code still treats usurpation of office as a public wrong which can be corrected only by proceeding in the name of the Government itself. It permits those proceedings to be instituted by the Attorney General of the United States and by the Attorney for the District of Columbia. By virtue of their position, they at their discretion, and acting under the sense of official responsibility, can institute such proceedings in any case they deem proper. But, there are so many reasons of public policy against permitting a public officer to be harassed with litigation over his right to hold office, that the Code, not only does not authorize a private citizen, on his own motion, to attack the incumbent's title, but it throws obstacles in the way of all such private attacks. It recognizes, however, that there might be instances in which it would be proper to allow such proceedings to be instituted by a third person—but, it provides that such "third person" must not only secure the consent of the law officers of the Government but the consent of the Supreme Court of the District of Columbia before he can use the name of the Government in *quo warranto* proceedings.

4. The Code—making a distinction between a "third person" and an "interested person"—recognizes also, that there might be instances in which a person might have such an *interest* in the matter as to entitle him to a hearing—even where he had failed to secure the consent of the Attorney General or District Attorney to use the name of the United States. Section 1540 deals with that case and provides that where these law officers have refused the request of a "person interested" "he may apply to the court by a verified petition for leave to have said writ issue." If, in the opinion of the court, his reasons are sufficient in law the said writ shall be allowed to be

issued . . . in the name of the United States on the relation of said interested person on his giving security for costs.

If the question of Frizzell's "interest" here had depended upon a matter about which the evidence was in conflict, the finding of the Supreme Court might not be subject to review. But if the established facts show that, as a matter of law he was not an "interested person" the court had no authority to grant him permission to use the name of the Government and the case must be dismissed. So that the fundamental question is whether the law of force in the District permitted him, as a private citizen without the consent of the law officers, to test Newman's title to the public office of Civil Commissioner.

Frizzell does not allege that he had been an incumbent of that office and had been unlawfully ousted before his term expired. He does not set up any claim to the office. And, of course, if he, as a citizen and a taxpayer, has the right to institute these proceedings, any other citizen and taxpayer has a similar right to institute proceedings against Newman and all others who "exercise within the District . . . a public office, civil or military." District Code, 1538 (1). Such result would defeat the whole policy of the law which still regards usurpation as a public wrong to be dealt with primarily by the public prosecutors.

5. In a sense—in a very important sense—every citizen and every taxpayer is interested in the enforcement of law, in the administration of law, and in having only qualified officers execute the law. But that general interest is not a private but a public interest. Being such, it is to be represented by the Attorney General or the District Attorney who are expected by themselves or those they authorize to institute *quo warranto* proceedings against usurpers in the same way that they are expected to institute proceedings against any other violator of the law.

That general public interest is not sufficient to authorize a private citizen to institute such proceedings; for if it was, then every citizen and every taxpayer would have the same interest and the same right to institute such proceedings and a public officer might, from the beginning to the end of his term, be harassed with proceedings to try his title.

6. As pointed out in the carefully prepared opinion of the majority of the Court of Appeals of the District, there is much conflict as to the meaning of the phrase "interested person" in this class of cases. At first reading the conflict seems irreconcilable. But upon examination it will appear that the difference is often due to a difference in the public policy and statutes of the respective States. In some the writ issues only at the request of the Government's law officers; in others at the instance of a person claiming the office; in others at the request of a person claiming the office or interested therein; in others at the instance of a person interested; in others at the request of any person who can secure the consent of the court; and in five or six others the legislature has thrown open the door and permitted *any person* who desires to do so to use the writ. This is true of the Acts underlying some of the decisions relied on by the Relator, Frizzell.

For example, the English cases are based on the statute of 9th Anne, ch. 20, which, in terms, related to suits against those "who unlawfully exercise an office within cities, towns and boroughs." It expressly authorized the courts to permit informations in the nature of *quo warranto* "at the relation of *any person . . . desiring to sue or prosecute the same.*" Some of the other decisions cited are from States where the statute provides that the proceedings might be instituted at the relation of "any person desiring to present the same"; "upon the complaint of any private party"; "upon the relation of any person desiring to sue or prosecute the same." But there

are so many and such weighty reasons against permitting private persons to raise questions as to the incumbent's title to a public office that, even in those States which permit "*any person*" to institute *quo warranto*, the courts have always required the relator to show that he was a citizen and taxpayer.

The act of Congress of force in the District instead of being limited to municipal officers applies to any office "*civil* or *military*" and differs from those in any of these States. It specially differs from those which treat the writ as being available to *any person*. The Code provides that a "third person"—the equivalent of "any person"—may institute the proceedings only after he has secured the consent of the law officers and the court. It makes a distinction between a "third person" and an "interested person" and provides that if the Attorney General refuses to give his consent to the latter such "interested person" may secure the right to use the name of the Government by satisfying the Supreme Court of the District that his reasons for applying therefor are sufficient in law.

Frizzell applied to the Attorney General for permission to institute the proceedings. Failing to secure that consent, he then applied to the Supreme Court claiming that the fact that he was a citizen and a taxpayer made him an "interested person" entitled to the use of the writ. But such a construction would practically nullify the requirement to obtain the consent of the Attorney General and the District Attorney. For if being a citizen and a taxpayer was sufficient to warrant the court in giving the consent, it was useless to require an application to be first made to the Attorney General because practically every litigant would have the qualification of citizenship and many would have that of being a property owner.

7. Considering the ancient policy of the law and the restrictions imposed by the language of the Code, it is evident that in passing this statute Congress used the

words "third person" in the sense of "any person" and the phrase "person interested" in the sense in which it so often occurs in the law—prohibiting a judge from presiding in a case in which he is interested; preventing a juror from sitting in a case in which he is interested; and permitting interested persons to institute *quo warranto* proceedings. In the illustrations suggested, the interest which a judge had as a member of the public would not disqualify him from sitting in a case of great public importance and in which the community at large was concerned. The interest which disqualifies a juror from serving, as well as the interest which would authorize this plaintiff to sue, must be some personal and direct interest in the subject of the litigation. The same definition has often been given in *quo warranto* cases. The interest which will justify such a proceeding by a private individual must be more than that of another taxpayer. It must be "an interest in the office itself and must be peculiar to the applicant." *Demarest* v. *Wickham*, 63 N. Y. 320; *Commonwealth* v. *Cluley*, 56 Pa. St. 270; *State* v. *Taylor*, 208 Missouri, 442; *Robinson* v. *Jones*, 14 Florida, 256; *In re Stein*, 39 Nebraska, 539; *State ex rel. Depue* v. *Matthews*, 44 W. Va. 372, 384; *Com. ex rel. Butterfield* v. *McCarter*, 98 Pa. St. 607; *State* v. *Boal*, 46 Missouri, 528; *Brown* v. *Alderman*, 82 Vermont, 529; *Mills* v. *Smith*, 2 Washington, 572; *Antrim* v. *Reardan*, 161 Indiana, 250; *Harrison* v. *Greaves*, 59 Mississippi, 455; *Andrews* v. *State*, 69 Mississippi, 740 (3), 746; *Toncray* v. *Budge*, 14 Idaho, 639; *Hudson* v. *Conklin*, 73 Kansas, 764; *Vrooman* v. *Michie*, 69 Michigan, 47; *Dakota* v. *Hauxhurst*, 3 Dakota, 205.

The language of the Code, supported by the history and policy of the law, sustains the proposition that one who has no interest except that which is common to every other member of the public is not entitled to use the name of the Government in *quo warranto* proceedings.

For if the allegations in such a suit by a private citizen set out any cause of action at all, it shows on its face that it was a cause of action belonging to the whole body of the public and which, therefore, should be prosecuted by the public representative.

The rule is the same regardless whether the office is elective or appointive. For in neither case is there any intent to permit the public office to be the subject-matter of private litigation at the instance of one who has no interest therein which differs from that of every other member of the public. The claim that this construction makes the statute nugatory cannot be sustained, for the statute, as already pointed out, gives a person who has been unlawfully ousted before his term expired, a right, on proof of interest, to the issuance of the writ and there might be cases under the civil service law in which the relator would have an interest and therefore a right to be heard.

8. The conclusion, that the Relator must have a personal interest in the office before he can sue in the name of the United States, is strengthened by the fact that the courts of the District not only have jurisdiction to issue *quo warranto* against officers of the District, but against all those, attached to the seat of government, who hold a statutory office. For, if a private citizen and taxpayer could institute *quo warranto* proceedings to test the title to the office of Civil Commissioner of the District, he could, under the same claim of right, institute like proceedings against any of those statutory officers of the United States who, in the District exercise many important functions which affect persons and things throughout the entire country.

The President has the power of removal and there have been few, if any, cases brought to test the title of Federal offices. But such cases might arise as to statutory officers attached to the seat of government and if

they did, the Supreme Court of the District could exercise *quo warranto* jurisdiction, as it now does in cases of mandamus and injunction against appointed Federal officers who perform duties in Washington. This appears from comparing the provisions of Rev. Stat., §§ 1795 and 1796 with § 1538 (1) of the District Code. The Revised Statutes declare that the District of Columbia shall be the seat of government, and "all offices attached to the seat of government *shall be exercised in the District of Columbia.*" The Code, [§ 1538 (1)] provides that the Supreme Court shall have jurisdiction to grant *quo warranto* "against a person who unlawfully holds or *exercises within the District* a . . . public office, civil or military." It was probably because of this fact, that National officers might be involved, that the Attorney-General of the United States was given power to institute such proceedings—instead of leaving that power to the District Attorney alone as would probably have been the case if only District officers were referred to in the Code.

Manifestly, Congress did not intend that all these officers, attached to the Executive branch of the Government at Washington, should be subject to attacks by persons who had no claim on the office, no right in the office, and no interest which was different from that of every other citizen and taxpayer of the United States.

9. This fact also shows that §§ 1538–1540 of the District Code, in proper cases, instituted by proper officers or persons, may be enforceable against National officers of the United States. The sections are therefore to be treated as general laws of the United States,—not as mere local laws of the District. Being a law of general operation it can be reviewed on writ of error from this court. *American Co.* v. *Commissioners of the District*, 224 U. S. 491; *McGowan* v. *Parish*, 228 U. S. 317.

It follows that the motion to dismiss is denied; the

application for a writ of certiorari is refused; the judgment is reversed, and the case remanded with instructions to dismiss the *quo warranto* proceedings.

Reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE PITNEY dissent.

MR. JUSTICE VAN DEVANTER dissents upon the ground that, the sections of the District Code being local laws, the case cannot be reviewed here on writ of error.

UNITED STATES *v.* HIAWASSEE LUMBER COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 133. Argued March 2, 1915.—Decided June 21, 1915.

In an action of ejectment brought by the United States to recover a tract of land in North Carolina, the result depended upon the validity of the probate and registration of the deeds under which the Government claimed title, and after reviewing and construing the various statutes of the State regulating such probate and registration, *held* (a) that the deed to the grantor of the United States, made in 1868, was validated as to probate and registration by an act of January 27, 1870; and (b) that the deed from this grantor to the United States, made in 1869, was admitted to registration, without limitation as to time, by force of the Connor Act of 1885 of North Carolina, and when so registered was made valid to pass title by the terms of the same act.

202 Fed. Rep. 35, reversed.

THIS was an action of ejectment brought by the United States against the Hiawassee Lumber Company in the Circuit Court of the United States for the Western District of North Carolina to recover a tract of land situate in Clay County, in that District and State, described as

follows: "Grant No. three thousand, one hundred and ten, containing five thousand acres, and beginning at a chestnut on the top of Tusquita Ball [Tusquita Bald] on the Mason County Line, and runs east three hundred and twenty poles to a chestnut on a mountain side, thence south seven hundred poles to a pine, thence west twelve hundred and forty poles to a stake, thence north seven hundred poles to a stake and hickory, thence east nine hundred and twenty poles to the beginning." Defendant's answer denied generally the allegations of the complaint, set up possession and title in itself to a part of the tract, and demanded judgment that it was the owner and entitled to the possession of said land. The trial court directed a verdict in favor of defendant, and the resulting judgment was affirmed by the Circuit Court of Appeals (202 Fed. Rep. 35).

From the bill of exceptions it appears that both parties claim under one Edwin B. Olmsted, who derived title to the lands from the State of North Carolina by certain grants dated November 10, 1867. One of these is Grant No. 3110, for 5,000 acres, described as in plaintiff's declaration. There are 16 other grants, each for 640 acres, the tracts adjoining each other in such manner as to form a quadrangle that admittedly includes the land claimed by plaintiff as well as much land besides. Plaintiff claims through deeds purporting to convey the 5,000 acre tract as described in Grant No. 3110. Defendant claims under a series of conveyances purporting to convey the 16 tracts of 640 acres each. So far as the bill of exceptions shows, there was no evidence of possession on either side, and the question turns upon the paper titles.

Plaintiff's chain of title is made up of the 17 grants to Olmsted and two deeds of conveyance. The first deed is dated February 7, 1868, made by Edwin B. Olmsted and wife, of the City of Washington, District of Columbia, to Levi Stevens, of the same City and District, pur-

porting to convey the 5,000 acre tract in question. It was acknowledged in due form on the day of its date in the District of Columbia by Olmsted and wife (she being privately examined), before John S. Hollingshead, a commissioner for the State of North Carolina in and for the District of Columbia. Besides the certificate of acknowledgment, it bears the following indorsements: (a) One showing that it was recorded December 14, 1868, in the land records for Cherokee County; but this may be disregarded, since it is not questioned that the lands described in the deed lie in Clay County, which was formed out of a portion of Cherokee in the year 1861. (b) Next is a certificate by the Register of Clay County that the deed was "duly registered in the register's office of Clay County" on February 23, 1869, mentioning the book and page. (c) Next is a certificate dated May 20, 1896, made by the clerk of the Superior Court of Clay County, stating that the certificate of Hollingshead, commissioner, "having been exhibited before me with the seal of his office attached, the same is adjudged to be in due form and according to law. Therefore let the foregoing instrument with all the certificates be registered." And, finally, there is a certificate of the registration of the deed on May 20, 1896, in Clay County.

The second deed is dated March 15, 1869, made by Stevens and wife, of Washington, D. C., to the United States, purporting to convey certain tracts granted by the State of North Carolina to E. B. Olmsted November 10, 1867, and describing 45 different tracts, one of which is the 5,000 acre tract in question. This was duly acknowledged by Stevens and wife before a commissioner for the State of North Carolina in and for the State of Pennsylvania on March 15, 1869. It was registered in Cherokee County August 4, 1871; but this is immaterial so far as its effect upon the lands in Clay County is con-

cerned. It was not registered in the latter county until May 20, 1896, and it was then registered after compliance with all the requirements of law.

Testimony was introduced on both sides upon the question of location; a map was introduced purporting to show the location of the 5,000 acre tract, and of the sixteen 640 acre tracts; it was testified that the former was located by an actual survey beginning at a chestnut on the Tusquita Bald, in the Mason County line, as indicated by the description and the map; and it was admitted that there was evidence sufficient to go to the jury as to the location.

Defendant claimed to derive title from Olmsted through, first, a decree of the Superior Court of Mason County, North Carolina, in an equity action brought by one Swepson against Olmsted in the year 1882, resulting in a deed of conveyance, made pursuant to the decree and order of the court, by Kope Elias, Commissioner, to A. Rosenthal, dated October 28, 1882, and duly registered in Clay County October 17, 1890; secondly, a quitclaim deed from Olmsted and wife to Rosenthal, dated October 31, 1882, registered in Clay County November 12, 1906, quitclaiming all interest of the grantors in the lands described in the Kope Elias deed; and, thirdly, certain special proceedings in the Superior Court of Alamance County, North Carolina, taken by the executrix of Swepson in the year 1884 for the sale of Swepson's "equitable and legal real estate," which resulted in a deed made by order of the court from Swepson's executrix to Rufus Y. McAden, dated May 11, 1888, duly registered in Clay County June 28, in the same year. Both the Kope Elias deed and the deed from Swepson's executrix to McAden purport to convey some interest in the 16 grants of 640 acres each. Other deeds were introduced to show that whatever estate or interest was conveyed by the deeds specified had become vested in defendant.

Mr. Assistant Attorney General Knaebel, with whom *Mr. S. W. Williams* was on the brief, for the United States.

Mr. Marshall W. Bell and *Mr. James H. Merrimon* for defendant in error.

MR. JUSTICE PITNEY, after making the foregoing statement, delivered the opinion of the court.

In order to simplify matters, we will dispose at the outset of a point that was ruled by the Circuit Court of Appeals in favor of plaintiff in error. As tending to sustain the ruling of the trial judge in directing a verdict for defendant, it was and is insisted that the 640 acre grants which figure in defendant's chain of title have priority over the 5,000 acre grant to which the deeds in plaintiff's chain of title refer. It is said that the lands were entered under the Cherokee land law, Laws 1852, chap. 169; Code of 1883, §§ 2464, *et seq.*; that the 5,000 acre grant is invalid for non-compliance with certain formalities prescribed by the law, and that even if valid it is subordinate to the 16 grants of 640 acres each, because, as is said, grants of this nature have effect according to the dates of the respective land entries, and the 16 grants were based upon entries antedating that upon which the 5,000 acre grant rests. We do not stop to examine the statutes upon which this contention rests, because we agree with the Court of Appeals that it is quite immaterial whether the 5,000 acre grant, independently considered, was valid or invalid. It is admitted that the 16 grants cover the same land, and all the grants were made to the same grantee upon the same day. It results that, in one mode or another, Olmsted on that day acquired the title of the State of North Carolina to the 5,000 acres. His deed to Stevens described that tract by its metes and bounds, as well as by reference to the grant number. If that deed is otherwise valid as

against defendant it conveys his title to the tract thus described, whether that title was derived from the State through Grant No. 3110 or through the other 16 grants.

The principal controversy turns upon the probate and registration of the deed from Olmsted to Stevens. The trial court held that under the laws of North Carolina the registration of 1869 was invalid as notice or for any purpose, but admitted in evidence the registration of 1896. The direction of a verdict in favor of defendant was based upon the theory that because the deed from Kope Elias, Commissioner, to Rosenthal was registered prior to the registration in 1896 of the deed from Olmsted to Stevens, Rosenthal thereby acquired the legal title as a purchaser for value without notice, and that his rights and the rights of those claiming under him were not affected by the registration of the Olmsted and Stevens deeds in the year 1896. The Circuit Court of Appeals, apparently deeming that there was no distinction, so far as registration was concerned, between the status of the Olmsted-Stevens deed and that of the deed made by Stevens to the United States; considered the question with respect to the latter deed, and, finding that its registration prior to 1896 (erroneously assumed to have been made in Clay County in 1871), was not valid, and no title passed thereby, concluded that the same was true of the registration of the Olmsted-Stevens deed in Clay County in the year 1869. But it so happens that between the acknowledgment of the Olmsted deed in February, 1868, and the acknowledgment of the Stevens deed in March, 1869, the law of North Carolina was changed in a material respect; and, for this and other reasons that will appear, we deem it proper to consider the earlier deed first.

The deed from Olmsted to Stevens was dated and acknowledged February 7, 1868. At that time the provisions of law governing the acknowledgment, proof, and registration of deeds were those found in Rev. Code 1855,

chap. 37, "Deeds and Conveyances," and chap. 21, "Commissioners of Affidavits and Probate of Deeds." We set forth the material portions in the margin.[1]

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[1] REVISED CODE, 1855.

CHAPTER 37.

1. No conveyance for land shall be good and available in law, unless the same shall be acknowledged by the grantor, or proved on oath by one or more witnesses in the manner hereinafter directed, and registered in the county where the land shall lie, within two years after the date of the said deed; and all deeds so executed and registered shall be valid, and pass estates in land, without livery of seizin, attornment, or other ceremony whatever.

2. All deeds, . . . and other instruments of writing required or allowed to be registered, may be admitted to registration in the proper county, upon being acknowledged by the grantor, or proved on oath before one of the judges of the supreme or superior court, or in the county court of the county where the land or estate is situate, unless otherwise directed, or before the clerk of such court, or his deputy. *Provided*, that nothing herein contained shall be construed to allow the privy examination of *femes covert* to be taken otherwise, than by law is specially directed.

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4. When any person shall desire to have registered any such deed [if the grantor or subscribing witness be beyond the limits of the State] . . . the court of pleas and quarter sessions . . . may issue a commission . . . to a commissioner or commissioners, authorizing any one or more of them to take the acknowledgment of the parties, or the examination of any one of the subscribing witnesses thereto, or other due proof thereof; and also the examination of any *feme covert* party to the same; and the proceedings of the commissioners, so authorized, being returned to the court, the court may proceed to adjudge that such deed or other instrument of writing is duly acknowledged or proved, and that the said examination is in due form: and thereupon the same, with the said proceedings, shall be registered; and such registration shall have the same effect as if the proceedings had been in open court.

5. When any deed conveying lands in this State . . . shall have been executed by any person, and it may be desired to take the probate or acknowledgment thereof out of this State, but within the United States, and the same shall be personally acknowledged by the person executing the same . . . before some one of the judges of

There is no question that the Olmsted deed was duly and properly acknowledged before a North Carolina commissioner in the District of Columbia, and the acknowledgment duly certified by him; so that, under the law as it then stood, upon the presentation of the deed with the accompanying certificate to the court of pleas and quarter sessions of Clay County, or to one of the judges of the Supreme Court or of the Superior Courts of North Carolina, a fiat for its registration would have followed, as of course.

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supreme jurisdiction, or a judge of the courts of law of superior jurisdiction within the State, Territory, or district where the parties may be,—and if any of the parties shall be a *feme covert* and she shall be privily examined by such judge, whether she doth voluntarily assent thereto— . . . Or when such deed, . . . or other instrument as aforesaid shall be so acknowledged or proved, and the privy examination taken as aforesaid, before any commissioners appointed by the governor of this State, according to law, and duly certified by him, such deed . . . or other instrument, being exhibited in the court of pleas and quarter sessions of the county where the property is situate, or to one of the judges of the supreme court or of the superior courts of this State, *shall be ordered to be registered with the certificates thereto annexed; and the same being registered in the county wherein the property may be situate, pursuant to such order . . . shall be valid in law for the purpose intended thereby, and shall be received in evidence in any court without further proof.*

CHAPTER 21.

* * * * * * * *

2. The governor is hereby authorized to appoint and commission one or more commissioners in such of the States of the United States, or in the District of Columbia, or any of the territories, as he may deem expedient, who shall continue in office during the pleasure of the governor, and shall have authority to take the acknowledgment or proof of any deed, mortgage, or other conveyance of lands, tenements, or hereditaments lying in this State, and to take the private examination of married women, parties thereto, or any other writings to be used in this State. And such acknowledgment or proof, taken or made in the manner directed by the laws of this State, and certified by the commissioner, *shall have the same force and effect, for all purposes, as if the same had been made or taken before any competent authority in this State.*"

After the deed was acknowledged, but before it was registered, the change to which we have referred was produced by the adoption of the Code of Civil Procedure in the month of August, 1868. Of that Code, Title XIX applies to Probate Courts, and its second chapter relates to the Probate of Deeds.[1] It required that deeds conveying lands in the State "must be offered for probate, or a certified probate thereof must be exhibited before the Judge of Probate of the county, in which the real estate is situated," and it applied this to deeds acknowledged before North Carolina commissioners in other States or in the District of Columbia, at the same time requiring an adjudication that the deed was duly acknowledged, etc.

The query at once arises, whether this act can be fairly construed to apply to deeds previously executed and acknowledged in accordance with the requirements of the prior law. The Act is a Code of Civil Procedure, and § 429 prescribes the *mode* in which the probate of deeds shall be made and the certified probate thereof passed upon. There is nothing in this section, nor, so far as we

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[1] CODE OF CIVIL PROCEDURE, 1868.

PROBATE OF DEEDS.

§ 429. How made.

All deeds conveying lands in this State . . . must be offered for probate, or a certified probate thereof must be exhibited before the Judge of Probate of the county, in which the real estate is situated, in the manner following; . . . .

4. Where the acknowledgment or proof of any deed or other instrument is taken or made, in the manner directed by the laws of this State, before any commissioner of affidavits for the State of North Carolina, appointed by the Governor thereof, in any of the States or territories of the United States or in the District of Columbia; and where such acknowledgment or proof is certified by such commissioner, *the Judge of Probate, having jurisdiction, upon the same being exhibited to him, shall adjudge such deed or other instrument to be duly acknowledged or proved in the same manner as if made or taken before him.*

have observed, is there anything in the Act of which it forms a part, that attempts expressly to regulate or impose conditions upon the registration of deeds or other instruments. We are referred to no decision by the courts of North Carolina that makes the new procedure a condition precedent to registration of a deed previously made and acknowledged and thereafter registered within two years after its date, pursuant to Rev. Code 1855, chap. 37, § 1.

But we deem it unnecessary to pass upon the question here suggested, for reasons that will presently appear.

It will be observed that in the Code of 1855 a very different effect was given by § 5 of chapter 37 to a certificate of acknowledgment taken by one of the commissioners appointed by the Governor under Chapter 21, from the effect given to the proceedings of a commissioner or commissioners specially appointed under § 4 of chapter 37. Proceedings before a special commissioner, being returned to the court, simply formed the basis upon which the court might proceed to adjudge that the deed was duly acknowledged or proved. But an acknowledgment taken by a standing commissioner (an official commissioned by the Governor and holding office during his pleasure), being duly certified, was not to be reviewed judicially before being ordered to registration. So it was expressly held by the Supreme Court of North Carolina in *Johnson* v. *Lumber Co.* (1908), 147 N. Car. 249, 251. And see, to the same effect, *Cozad* v. *McAden*, 148 N. Car. 10, 12; *S. C.*, 150 N. Car. 206, 209, 210. That such was the law prior to the adoption of the Code of Civil Procedure was recognized by the Circuit Court of Appeals (202 Fed. Rep. 41).

The Code of 1855 did contemplate an order or fiat for registration, and there is no evidence that the Olmsted-Stevens deed, when registered in 1869, was accompanied by such an order, except the official certificate that it was "*duly* registered." But it has been in effect held that the statutory provision for such an order is direc-

tory, not mandatory; and that, if the deed be in fact registered after proper probate, the fiat becomes non-essential. *Holmes* v. *Marshall*, 72 N. Car. 37, 40; *Young* v. *Jackson*, 92 N. Car. 144, 147; *Darden* v. *Steamboat Co.*, 107 N. Car. 437, 445. The first two of these cases were distinguished in *Evans* v. *Etheridge*, 99 N. Car. 43, 47; but this case did not hold that the absence of the fiat for registry was fatal.

However, assuming the amendment of 1868 to have a retrospective effect, and to be so construed as to require the certificate of acknowledgment of the Olmsted-Stevens deed to be submitted to the adjudication of the Judge of Probate, and then to the approval of the proper court or judge, and an order for its registration to be made, as conditions precedent to registration, we have next to consider the effect of an act of the General Assembly of North Carolina, ratified January 27, 1870 (Laws 1869–1870, p. 69), and entitled "An Act concerning the probate and registration of deeds and other instruments." Its language is: "*That the probate of all deeds and other instruments required to be registered heretofore taken under laws existing prior to the adoption of the code of civil procedure, is hereby declared valid to all intents and purposes, and shall be admitted to registration as if the probate had been taken under existing laws.*" The form of expression indicates a legislative intent to validate probates theretofore taken in accordance with the requirements of the law as it existed before the Code, including probates thus taken subsequent to the ratification of the Code and before the validating act. (And see *Cozad* v. *McAden*, 148 N. Car. 10, 12, containing a *dictum* to that effect.) But we need not go so far, since it is not and cannot be questioned that the Act validates and admits to registration probates taken before the Code and in accordance with the law as it stood when they were taken. The Court of Appeals, referring to this Act and to a later curative

act ratified December 12, 1876 (Laws 1876–1877, p. 68), and considering their effect upon the registration of the two deeds under which plaintiff claims said (202 Fed. Rep. 48): "There is nothing contained in the foregoing that could be construed to relate to the defects alleged as respects the probate of these deeds. *In this instance there was no probate at all* [italics ours]. Therefore it cannot be said that this act, which undertakes to cure defective probates, can have any relation to instruments attempted to be registered in the manner these were. For that reason we do not think this act applies to the case at bar."

Confining ourselves to the effect of the 1870 act upon the Olmsted-Stevens deed, in our opinion the court erred in holding there was "no probate" of the deed, within the meaning of the curative act.

It is possible that, after the Code of Civil Procedure extended to other cases the requirement of adjudication which before that time had applied only with respect to acknowledgments and proofs taken before specially appointed commissioners, the word "probate" may have come to be used with reference to the act of judicial approval by the Judge of Probate, rather than to the certificate of acknowledgment or proof submitted for such approval.

But the act of 1870 employed the term "probate" with respect to proceedings taken under laws that existed prior to the adoption of the Code of Civil Procedure, and we must look to the prior law in order to determine in what sense the word was used in the curative act. In general usage the term is applied rather to wills than to deeds, and signifies official proof, sometimes *ex parte*, before a judicial or quasi-judicial officer or tribunal. In North Carolina, from an early day, it has been applied to the proof or acknowledgment required to be made of deeds and other instruments in writing as a

condition precedent to registration. In early times, probate was made before the county courts. Laws 1807, ch. 16, p. 10; Laws 1814, ch. 11, p. 12; ch. 19, p. 14. Afterwards, deeds were allowed to be acknowledged or proved "either before one of the judges of the supreme court or of the superior court, or in the court of the county where the land lieth." Rev. Stat. 1837, ch. 37, § 1. And in the Revised Code of 1855, ch. 37, § 2, the clerk of the county court and his deputy were included among those who might take acknowledgments and proofs within the State. Such acknowledgment or proof was frequently referred to as "probate." Thus, we find that Chapter 21 of Rev. Code 1855, under which the commissioner who took the acknowledgment in question was appointed, has for its title "Commissioners of Affidavits and *Probate of Deeds*." The index at the head of the chapter and the index-note in the margin read: "Governor may appoint commissioners to take and certify *probate* of deeds &c. in other States." And so with respect to Chapter 37: the word "probate" is employed in the head and marginal indexes with respect to §§ 4 and 5, and is also employed in the body of § 5. In short, the word appears to have been commonly employed, prior to the Code of Civil Procedure, as referring to the proof or acknowledgment of deeds as a condition precedent to registration, irrespective of whether it was taken before a court or a commissioner. And it was so employed in judicial opinions. *McKinnon* v. *McLean* (1836), 19 N. Car. (2 Dev. & Bat.) 79, 83–86; *Carrier* v. *Hampton* (1850), 33 N. Car. (11 Ire.) 307, 310; *Freeman* v. *Hatley* (1855), 48 N. Car. (3 Jon.) 115, 117–119; *Williams* v. *Griffin* (1856), 49 N. Car. (4 Jon.) 31, 32; *Johnson* v. *Pendergrass* (1857), 49 N. Car. (4 Jon.) 479, 480; *Simmons* v. *Gholson* (1858), 50 N. Car. (5 Jon.) 401, 403.

Indeed, this meaning of the term "probate" is recognized in § 429 of the Code of Civil Procedure itself, for

this requires that deeds "must be offered for probate, *or a certified probate thereof must be exhibited* before the Judge of Probate;" and, in going on to specify the manner of doing this, it treats the certificate of acknowledgment or proof as the certified probate thus required to be exhibited.

To construe the act of 1870 as applying only to proceedings such as were first prescribed by the Code of Civil Procedure would leave it nearly or quite devoid of force. The things to be validated were probates taken under laws that existed prior to the adoption of that Code. We cannot limit this to proceedings that would be deemed probate under the test adopted by the Code itself, for these would require no validation. And in *Cozad* v. *McAden*, 148 N. Car. 10, 12, the Supreme Court of North Carolina, *arguendo*, construed the act of 1870 as dispensing with the adjudication by the Judge of Probate and "making probates in the previous manner valid up to 27 January, 1870."

We deem it equally clear that the effect of the curative act is not confined to deeds that remained unregistered. With regard to these, it contained a legislative fiat that they should be admitted to registration. But, certainly, it was not intended that similar deeds already registered should stand on a less favorable footing. On the contrary, the intent is that all deeds probated in such manner that under the previous laws they were entitled to be admitted to registration, shall be validated "to all intents and purposes." The result is that if already registered when the act of 1870 was ratified the legislative fiat for registration, which took the place of the judicial fiat, applied to them *nunc pro tunc*. Considering the change in the law that had been produced by the then recent act of 1868, and the confusion naturally attributable to it, we think the construction we have placed upon the act of 1870 correctly expresses the legislative purpose.

The result of this is that, at least from the ratification of the curative act, the Olmsted-Stevens deed became "good and available in law," and notice to all the world, including those under whom defendant claims.

The Court of Appeals (202 Fed. Rep. 42) said: "It was not contended by counsel for the plaintiff in the court below that the attempted registration of the deed from Olmsted to Stevens was sufficient to divest Olmsted of the legal title." If by this it was meant that counsel did not assert whatever rights plaintiff had under the registration of 1869, or waived any rights so asserted, or did not fairly except to the adverse rulings of the trial court upon the question, we cannot agree. The first exception (taken when the Olmsted deed was offered and the court excluded from evidence the registration of 1869) shows that, in response to an inquiry from the court, "Upon which registration are you offering the deed?" plaintiff's counsel answered, "Both." And in the ensuing colloquy the court stated the respective positions of opposing counsel as follows: "He [meaning plaintiff's counsel] says that I am offering a deed registered in 1868 [meaning 1869], and also one which we say was registered in 1896. Defendant's counsel says this deed registered in 1868 [1869] cannot be accepted, as it is not legally registered and is void." And plaintiff's exception was: "To the ruling of the court excluding the record offered in evidence of the registration of the deed in 1869." It is true that after the court had ruled this point against plaintiff, and after the introduction of defendant's evidence, plaintiff again offered the record of the registration of 1869, "not for the purpose of showing title [that purpose had already been overruled] but as evidence of notice to the purchasers, simply as a circumstance giving notice." This did not amount to a waiver of the point previously reserved. Besides, at the close of all the evidence, plaintiff asked for certain instructions based in effect upon the

1869 registration, and took exceptions to the action of the trial judge in refusing these and in instructing a verdict for defendant. The question we have passed on was clearly reserved by the exceptions.

The deed from Olmsted to Stevens, its probate, and its registration in Clay County in 1869, having been validated "to all intents and purposes" by the act of 1870—long prior to the derivation of defendant's title from Olmsted—we must next consider the deed from Stevens to the United States. For, of course, plaintiff must succeed on the strength of its own title, and the latter deed is an essential link in the chain.

This deed stands upon a different footing from the Olmsted deed, for it was both made and acknowledged after the ratification of the Code of Civil Procedure in 1868, and it was not registered in Clay County within two years after its date, nor until sometime in 1896, being then accompanied with certificates of probate that complied with the provisions of the Code of Civil Procedure. It was acknowledged before the act of January 27, 1870; but, supposing that Act to be applicable to deeds acknowledged after the adoption of the Code of Civil Procedure, and in a mode not conforming to its provisions but conforming to the provisions of the previous law, it cannot avail plaintiff because it did not dispense with the necessity of registration within two years from the date of the deed, imposed by Rev. Code, 1855, chap. 37, § 1.

Nor do we think the deed comes within the act of December 12, 1876, for it was not registered within two years after the ratification of that Act, as by its terms was required.

As we have already seen, Rev. Code 1855, ch. 37, § 1, declared that no conveyance of land should be "available in law" unless registered in the county where the land lay, within two years after its date. Prior to the Connor Act of 1885, presently to be mentioned, it was settled law in

North Carolina that an unregistered deed could not be introduced in evidence and did not create a perfect legal title. It was sometimes treated as an executory contract between the parties, sometimes as conferring an equitable title, or an incomplete legal title; the difference is immaterial for present purposes. Unless registered within the two years allowed by the Code of 1855, or as allowed by statutes extending the time, of which there were many but none that applies here, the deed was not "available in law." On the other hand, when recorded within the time allowed by any act of the legislature, it related back to the time of its execution, and conveyed a complete legal title as of that date, which was paramount even to the title acquired by a purchaser for value from the same grantor without notice of the unregistered deed. *Phifer* v. *Barnhart* (1883), 88 N. Car. 333, 338, and cases cited; *Austin* v. *King* (1884), 91 N. Car. 286, 289; *Laton* v. *Crowell* (1904), 136 N. Car. 377, 379.

But by § 1 of the Connor Act—chap. 147, Pub. Laws 1885—§ 1245 of the Code of 1883 was struck out (this had taken the place of Rev. Code 1855, chap. 37, § 1), and in its place the following was inserted:

"No conveyance of land . . . shall be valid to pass any property, as against creditors or purchasers, for a valuable consideration from the donor, bargainor or lessor, but from the registration thereof within the county where the land lieth: *Provided however*, that the provisions of this act shall not apply to . . . deeds already executed, until the first day of January, one thousand eight hundred and eighty-six: *Provided further*, that no purchase from any such donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to the first day of December, one thousand eight hundred and eighty-five, when the person or persons holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land,

either in person or by his, her or their tenants, at the time of the execution of such second deed, or when the person or persons claiming under or taking such second deed, had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder."

By § 2, provision was made for registering deeds executed prior to the year 1855 upon special proof. And, by § 3, all other deeds, having been acknowledged or proven in the manner prescribed by law, were permitted to be registered, "and all deeds so executed and registered shall be valid, and pass title and estates without livery of seizin, attornment or other ceremony whatever."

Under this Act, as has been uniformly held by the Supreme Court of the State, there is no limitation as to the time when the deed shall be registered; the Act simply provides that the deed shall not be valid against creditors or purchasers for value except from registration. *Hallyburton* v. *Slagle*, 130 N. Car. 482, 484; *Cozad* v. *McAden*, 148 N. Car. 10, 11; *Brown* v. *Hutchinson*, 155 N. Car. 205, 208.

Therefore, the registration of the deed from Stevens to the United States in Clay County in 1896 made it valid to pass title as between the parties and for all purposes, unless its effect is limited by what is contained in § 1 of the same Act. But it will be observed that the primary design of that section is to protect "creditors or purchasers, for a valuable consideration *from the donor, bargainor or lessor*" in the unregistered instrument—those, in short, who may be presumed to have relied upon his apparent ownership of the land. And, by the terms of the second proviso, "no purchase from any *such* donor, bargainor or lessor shall avail or pass title as against any unregistered deed [such as the Stevens deed] . . . when the person or persons claiming under or taking *such second deed*, had

at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder." Stevens made no "second deed." And since defendant and its predecessors in title did not claim under him, but claimed under Olmsted—of whose deed to Stevens they had constructive notice, by reason of its registration in 1869 and the curative act of 1870—it follows that the registration of the Stevens deed in 1896 makes it good as against defendant.

It thus appears that plaintiff's paper title as registered must prevail over that of defendant. This renders it unnecessary to consider whether, aside from the registration of the Olmsted deed in 1869, defendant and those under whom it claims were purchasers without notice, within the meaning of the second proviso of § 1 of the Connor Act. Upon this question, therefore, we express no opinion.

Judgment reversed, and the cause remanded for further proceedings in accordance with this opinion.

MR. JUSTICE DAY and MR. JUSTICE HUGHES concur in the result, because, while agreeing with the Circuit Court of Appeals as to its disposition of the case otherwise, they think there was testimony tending to show that Rosenthal was not a purchaser for value, and that question should have been submitted to the jury under proper instructions, since, unless Rosenthal was such purchaser within the terms of the Connor Act, plaintiff was entitled to recover.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

CHATER *v.* CARTER, EXECUTOR OF HARTWELL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 544. Argued April 30, May 3, 1915.—Decided June 21, 1915.

A trust of certificates of stock to cause dividends thereon to be paid to a designated party as beneficiary for a specified period and on the expiration thereof to transfer the stock itself to the beneficiary if living unless childless in which event the trustee was to hold the stock and pay the dividends to the beneficiary during life and on the death of the beneficiary to distribute to designated parties, *held*, in this case, to have failed in case of the death of the beneficiary within the period specified both as to the stock and the dividends and that the trustee was bound to return the stock to the donor and that it did not pass to the heirs or personal representative of the beneficiary.

In construing a declaration of trust, in this case in form of a letter and phrased in simple language, the guiding principle is to seek the intention of the maker, as expressed in the instrument; and the court is not called upon to strain the meaning of words, as is sometimes done in the case of wills so as to avoid intestacy.

Where the death of the beneficiary defeats the trust and leaves the trustee without directions or authority to transfer the fund to any beneficiary, as he is *functus officio* and cannot in equity retain the fund for himself, there is a resulting trust for the donor to whom he must redeliver the fund.

22 Hawaii, 34, affirmed.

THIS is an appeal from a decree of the Supreme Court of Hawaii (22 Hawaii, 34), affirming a decree of the Circuit Court of the same Territory which dismissed a bill in equity brought by Charles Hartwell Chater, a minor, by his father, Charles H. Chater, as next friend and guardian, in which the father joined as a complainant in his own right and as Administrator of the estate of his deceased wife, Charlotte Lee Hartwell Chater; the defendants being Alfred W. Carter, as trustee of a trust

created by the late Alfred S. Hartwell, deceased, in his lifetime, Alfred W. Carter as the executor of the will of Alfred S. Hartwell, deceased, Mabel R. Hartwell, and the Hawaiian Sugar Company, a corporation organized and existing under the laws of the Territory of Hawaii. The object of the bill was to require an accounting and transfer of 585 shares of the capital stock of the Sugar Company and the dividends declared thereon since August, 1909, including 292½ shares of new stock issued as a dividend. The case was heard upon an agreed statement of facts in substance as follows:

"Alfred S. Hartwell died in Honolulu on the 30th day of August, 1912, leaving a will, duly proved in the Circuit Court of the First Circuit, Territory of Hawaii, on the 15th day of October, 1912. The defendant Alfred W. Carter was appointed executor in said will and qualified and is now acting as such. Charles A. Hartwell, also appointed, did not qualify. The deceased was from 1868 to 1874 a judge of the Supreme Court of Hawaii, from 1874 to 1904 one of the leading attorneys in Hawaii, and from 1904 to 1907 a judge, and from 1907 to 1911 chief justice of the Supreme Court of Hawaii. He was the father of seven daughters all of whom except Charlotte Lee Hartwell Chater now survive, to-wit, the five named in the instrument dated March 27, 1909, attached to the complaint herein marked 'Exhibit A,' namely: Charlotte Lee Hartwell Chater, Mabel R. Hartwell, Dorothy Hartwell, Bernice Hartwell and Juliette Hartwell, ('Lottie Lee,' named in said instrument Exhibit 'A,' being Charlotte Lee Hartwell Chater, and 'Mabel,' being Mabel R. Hartwell), and also Madeline Hartwell Judd and Edith Hartwell Carter, the latter being then and now the wife of Alfred W. Carter, defendant. Charlotte Lee Hartwell Chater had been married to the complainant, Charles H. Chater, shortly before the date of said instrument, to-wit, on July 15, 1908, and was then on March 27, 1909,

of the age of 32 years and without children. The daughters named in said instrument, other than said Charlotte and Mabel, were at that time unmarried. All the daughters were of age. Mabel had children, who still survive.

"Charlotte Lee Hartwell Chater died in Natick, in the County of Middlesex, Commonwealth of Massachusetts, where she had been residing with her husband, Charles H. Chater, on the 3rd day of September, 1909, in childbirth, intestate, leaving the complainants, her husband, Charles H. Chater, and one child, the complainant, Charles Hartwell Chater, who was born on August 30, 1909; thereafterwards, on the 15th day of November, 1909, the Probate Court of the County of Middlesex duly appointed the complainant, Charles H. Chater, administrator of the estate of said Charlotte Lee Hartwell Chater, and issued letters to him, and he duly qualified as such and is now acting; and said Probate Court, on the 17th day of December, 1909, duly appointed said Charles H. Chater guardian of the person and estate of the complainant, Charles Hartwell Chater, and issued letters of guardianship to said Charles H. Chater, who qualified and is now guardian of said Charles Hartwell Chater.

"The Hawaiian Sugar Company is and was at all times hereinafter named a corporation existing under the laws of the Territory of Hawaii, having its usual place of business in Honolulu, in said Territory.

"Said Alfred S. Hartwell, being a man of ample means and the owner of a large number of shares in the Hawaiian Sugar Company, on the 27th day of March, 1909, transferred to the name of Alfred W. Carter, as trustee for Charlotte Lee Hartwell Chater, 585 of such shares and caused a certificate to be issued to the said Alfred W. Carter as trustee for Charlotte Lee Hartwell Chater for said 585 shares, and delivered said certificate to said Al-

fred W. Carter, Trustee, and, at the same time, executed and delivered a declaration of trust, as follows:

"Honolulu, T. H., March 27, 1909.

"Mr. Alfred W. Carter, City.

"DEAR ALFRED: I enclose certificate in your name as trustee for Juliette for 415 shares and another certificate in your name as trustee for Dorothy for 420 shares, another in your name as trustee for Lottie Lee for 585 shares, also a certificate in Lottie Lee's name (being those which I gave her before she was married) for 250 shares, also three blank forms of receipts in duplicate for you to sign and hand to me, if you please.

"The trust for both Juliette and Dorothy is to see that the dividends are paid to them, or, what I presume would be better, placed to their credit with Bishop & Co. where each of them now has an account. If either of them should die before returning here her shares are to be divided between the two surviving unmarried girls; if neither of them returns both their shares to go to Bernice, if living, otherwise to all the surviving sisters equally. I am aware that this is simply a temporary arrangement—I hope it is—and that either of them has a right to call upon you to make over the shares to her at any time.

"The trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her life-time, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as

Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family.

"I also enclose for you to retain for Mabel Certificate No. — in her name for 200 shares Hawaiian Sugar Stock.

"I have been arranging with the Brewers to draw my salary and to pay Lottie Lee and Mabel on the 15th of each month their dividends. I can continue to do this although it may be better for some reasons to arrange with Alexander & Baldwin to remit the dividends directly to them from New York, in which case there would be a charge of 20 ct. a hundred unless they shall accede to my request to make no charge for exchange.

"I also enclose certificate in Bernice's name for 420 shares which I am now giving her and also for 165 shares which I gave her recently. I do not know where the certificate for 250 shares which I formerly gave her is. I think it would be wise if the certificates of all the girls should be retained in your office and to have that understood by them.

"Very truly,
"ALFRED S. HARTWELL.

"This declaration of trust is the aforesaid 'Exhibit A.'

"At the same time, similar certificates were issued and delivered to said Alfred W. Carter, as trustee for Juliette Hartwell and Dorothy Hartwell, for the shares mentioned in said declaration.

"On the same day Alfred S. Hartwell caused a certificate to be issued in the name of Charlotte Lee Hartwell Chater for the 250 shares referred to in the declaration of trust, which certificate was also handed to said Alfred W. Carter.

"Charlotte Lee Hartwell Chater was duly notified of these transactions, the information coming through a letter from Alfred S. Hartwell to Charles H. Chater on March 29, 1909, as follows:

"HONOLULU, T. H., March 29, 1909,
"Mr. Charles H. Chater, South Natick, Mass.

"MY DEAR MR. CHATER: I have not been a good Correspondent for I have had many cares and responsibilities resting upon me.

"I am simply writing to you now about a matter of Lottie Lee's which I do not wish to write to her under present conditions or to trouble her at all about it. It is this—before her marriage I had given her 250 shares of the Hawaiian Sugar Stock paying regularly a monthly dividend of $75. Since a sale was made last summer of my large holdings in the American Sugar Co. (Molokai ranch) I have paid off the heavy indebtedness which had been burdening me for several years and am now dividing the shares in the Hawaiian Sugar stock which formerly had been pledged for my indebtedness in such way as to give Lottie Lee 585 shares more, which I am placing with Alfred W. Carter in trust (as explained in my letter to him) 'to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years she shall have no child living, in which case the trustee to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr Chater will observe, that as to these additional 585 shares they shall remain in my family.'

"I have been in the habit of arranging with Charles Brewer & Co. in Boston to collect my salary and pay Lottie Lee $200 a month on my account; I am now writing them to send her $250 instead on April 15, May 15, and

June 15. Alfred, as her trustee, will require receipts for the dividends on the 585 shares which he holds in trust, which will be $175.50 a month. I accordingly enclose receipts for Lottie Lee to sign and send to him.

"I will also cause the Brewers to continue to send the $75 a month for April, May and June dividends on the 250 shares, which I will collect here and have them pay on my account. One reason why I do not arrange for longer payment by them is that I am quite likely to go east in June—I hope to do so—and to see you all—and am aware of the uncertainties of life, you know. Alfred will arrange after that to send a bill of exchange to Lottie Lee monthly for the entire $250.50 coming to her, less exchange, which will be a small sum if he arranges to have the New York agents do this, which I think he will.

"It might also be well for Lottie Lee to give Alfred her proxy as to the 250 shares which I am turning over to him, a form for which I am enclosing herewith.

"I am making the same apportionment of my property between Madeline, Lottie Lee, Juliette, Bernice and Dorothy, future arrangements for the others to await contingencies, and I am in my will giving my homestead here to Juliette, Bernice and Dorothy, while there will always be a home where any of their sisters and their families will be welcome.

"I am much gratified to learn that you are going out to South Natick. I shall hope to be able to go out there this summer, in which case I may arrange to live in the old cottage (Aunt Martha's house) where my childhood and many of my later years were spent. I do not mean that I am not well assured of a welcome from you and Lottie Lee in the new Cottage, but by going into the old house I shall feel free, as you can see, to get a friend or two out there at any time when it will not interfere with Mabel and her family going there. At any rate I have not been there since my sister's death and that will be the place in

which I should like to stay, it now seems to me, when I am east in the summers.

"You will know best whether to trouble Lottie Lee just now to look this letter over. Do entirely as you think fit.

"Faithfully yours,

"(S'g'd) ALFRED S. HARTWELL.

"Alfred W. Carter endorsed and deposited the dividend warrants on said 585 shares for the months of April, May and June, 1909, in the bank to the credit of Alfred S. Hartwell, who subsequently paid the amounts of the dividends over to Charlotte Lee Hartwell Chater, who thereafter sent to said Alfred W. Carter receipts for the same, the receipt for the dividends for the month of April reading as follows, the receipts for the months of May and June being in the same form:

'BOSTON, MASS., April 15, 1909.

'Received of Alfred W. Carter, Trustee, per Charles Brewer & Co., one hundred seventy-five and 50/100 ($175.50) dollars, April dividends on 585 shares of Hawaiian Sugar Co. stock, held by him as my trustee.

'(Signed) CHARLOTTE L. H. CHATER.'

"Alfred W. Carter endorsed and deposited in the bank the dividend warrants on said shares for the months of July and August, 1909, and sent the amounts of the said dividends to Charlotte Lee Hartwell Chater.

"Alfred W. Carter endorsed and delivered the dividend warrants on said shares for September, 1909, and the following months to A. S. Hartwell, until the transfer of said shares to A. S. Hartwell.

"After the death of said Charlotte Lee Hartwell Chater the defendant Alfred W. Carter delivered to her said administrator said certificate for 250 shares, but without the knowledge or consent of the complainants, endorsed as trustee for Charlotte Lee Hartwell Chater, said certificate for 585 shares to said Alfred S. Hartwell, and a new certificate was on November 29, 1909, issued to said

Alfred S. Hartwell in his own name by the defendant the Hawaiian Sugar Company. On the 18th day of May, 1910, said Alfred S. Hartwell transferred said certificate for 585 shares to the defendant, Mabel R. Hartwell, and the defendant Hawaiian Sugar Company issued a new certificate on that date to said defendant, Mabel R. Hartwell, in her name for 585 shares, she not knowing at the time that the stock was the same stock which her father had previously transferred to Alfred W. Carter, Trustee for her sister, Charlotte Lee Hartwell Chater, and having no knowledge of the terms of that trust but receiving the same without consideration and as a gift from her father and not on any secret trust or understanding.

"It is conceded, if admissible, that the said transfer of said stock by Alfred W. Carter to Alfred S. Hartwell was made by said Alfred W. Carter in good faith and on demand of said Alfred S. Hartwell and under the advice of counsel sought and received by said Alfred W. Carter, and that the said transfer of said stock by Alfred S. Hartwell to Mabel R. Hartwell was made by said Alfred S. Hartwell in good faith and under the advice of counsel sought and obtained by him after the demand for said stock made on him by said Charles H. Chater.

"On the 1st day of July, 1910, the Hawaiian Sugar Company declared a stock dividend of 50 per cent., paid the said Mabel R. Hartwell $20 for a fractional one-half share, and on July 2nd issued to the said Mabel R. Hartwell as said dividend 292 shares additional stock, which were included in a new certificate for 1552 shares in Mabel R. Hartwell's name, which 1552 shares are still standing in her name."

It was further stipulated that cash dividends were paid as they accrued to A. W. Carter, Trustee, from September, 1909, to January, 1910, to Alfred S. Hartwell from that date until May, 1910, and thereafter until the commence-

ment of the suit to Mabel R. Hartwell, subsequent dividends having been retained by the company. The market value of the stock is likewise stated, showing that the sum in controversy exceeds the amount requisite for an appeal to this court. The following also appears:

"The estate of said Charlotte Lee Hartwell Chater is not indebted to any one; the known heirs are the complainants, Charles H. Chater and Charles Hartwell Chater; and the said Charles H. Chater consents that any interest which he may have in said stock or said dividends may be accounted for and paid to himself as guardian for said Charles Hartwell Chater."

Mr. David L. Withington, with whom *Mr. Joseph P. Bell* was on the brief, for appellants:

A present equitable title to the stock vested in Mrs. Chater, which has never been divested.

An equitable title passed to Mrs. Chater, subject to the trust.

The trust having expired by its own limitation, without divesting the beneficiary of her title, the legal title followed the equitable title to the beneficiary or her estate.

There is no resulting trust to the donor in the case of a gift to a child.

There was a vested future interest to Mrs. Chater, which did not lapse on her death. General rules of construction favor a vested gift in this case. The law favors a vested, rather than a contingent, interest. A gift of intervening income is evidence of a vested gift of the principal. Failure of donor to provide a gift over is evidence that the gift was not intended to be contingent. The fact that like gifts made at the same time were treated by donor as vested is evidence that Chater gift was vested. Language in a trust is to be construed most strongly against the donor, the party using same. The language of the transaction itself shows a vested gift. There is an implied gift to

Charles Hartwell Chater on the death of his mother before January 1, 1913. The exact language as to these dividends is one of an absolute vested gift. The general rules of construction favor a vested gift as to the dividends. The law favors a vested, rather than a contingent, gift. Where language sets out a complete gift the court will not override or cut it down unless the language contra is clear and unequivocal. The construction of the particular clause shows a vested gift. An annuity so passes. Gifts of income of real estate for years pass to the estate of the beneficiary. An interest in life insurance policy issued for the benefit of a person other than the insured, passes to the beneficiary's estate.

The defendants Mabel R. Hartwell, Alfred W. Carter, and Hawaiian Sugar Company are liable to the complainants.

Numerous authorities of this and other courts support these contentions.

Mr. Robbins B. Anderson for appellees.

Mr. Justice Pitney, after making the foregoing statement, delivered the opinion of the court.

We have here a trust declared in writing by the late Judge Hartwell, of Hawaii, a man of ample means and of long experience as a practicing lawyer and judge, the father of seven daughters, four married, three unmarried, of whom five were named and in some way provided for in the trust instrument. The subject of the controversy is 585 shares of the stock of the Hawaiian Sugar Company, for which a certificate accompanied the trust instrument, the certificate being in the name of "Alfred W. Carter as Trustee for Charlotte Lee Hartwell Chater;" separate certificates being at the same time issued and delivered to Mr. Carter as trustee for Juliette Hartwell and Dorothy

Hartwell, respectively, and a certificate for 250 shares in the name of Charlotte Lee Hartwell Chater being also delivered to him.

The date of the trust instrument is March 27, 1909. The particular clause out of which the controversy arises reads as follows:

"The trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her life-time, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family."

The substance of this was copied into Judge Hartwell's explanatory letter to his son-in law, Mr. Chater, dated two days after the trust instrument, and which all parties have treated as throwing a legitimate light upon the meaning of that instrument.

The trust for Mrs. Chater was evidently created in view of her approaching maternity, an event that occurred about four months before "January 1st, next," and was followed by her death on the 3d of September, 1909, leaving a son, who still survives. The question is, Who is entitled to the shares of stock and to the dividends accruing after January 1, 1910?

Appellants contend (1) that upon the establishment of the trust accompanied by the delivery to the trustee of the stock certificate naming her as beneficiary, an equitable title passed to Mrs. Chater subject only to

the trust, and that when the trust expired by its own limitations the legal title followed the equitable title and became vested in Mrs. Chater's estate; or (2) that there was a vested future interest in Mrs. Chater, which did not lapse upon her death; or (3) that even if the gift to Mrs. Chater was not vested there was an implied gift to her son upon her death prior to January 1, 1913. And, in any event, it is contended (4) that the gift of the dividends to Mrs. Chater for the period of three years from and after January 1, 1910, was absolute and passed to her estate.

Appellees contend, on the other hand, that by the terms and true meaning of the trust instrument there was no present gift to the beneficiary, expressed or implied, creating any interest, legal or equitable, but only a direction to the trustee to pay or transfer the subject of the trust to the beneficiary at a future time upon express condition that she were then living; that her death before the first of January, 1910, defeated the trust as to the dividends as well as the principal; and that since the trustee was thus left without directions or authority to transfer the stock or the dividends to any beneficiary, and could not hold them for himself, a resulting trust arose in favor of the donor.

The declaration of trust is in the form of a letter, and is clearly and simply phrased, without employment of technical terms. In seeking its true construction, little assistance can be had from technical rules. The guiding principle must be, to seek the intention of the settlor. We mean, of course, his intention as expressed. Not, What did he intend to say? but, What did he intend by what he did say? must be the test.

We cannot yield to the argument that because the stock certificate was caused to be issued in the name of Mr. Carter as trustee for Mrs. Chater there was a present transfer of the equitable title to her, subject only to the terms of the declaration. The mention of her name in

the certificate had its proper purpose in earmarking the stock and identifying the trust to which it pertained; but the terms of that trust must be found in the accompanying letter.

In construing it, we are not called upon to strain the meaning of words, as is sometimes done to avoid intestacy when wills are to be construed. Judge Hartwell evidently contemplated that Mrs. Chater was to become a mother, and he makes the ultimate disposition of the stock (if she survives) turn upon the question whether she shall have a child or children living at the end of the designated period of three years from January 1, 1910; yet he makes no provision for the child in the event of her death in the meantime. And even the payment of dividends to Mrs. Chater is postponed until January 1, 1910. We are left without explanation of this, unless it be attributable to a purpose that the inception of the trust should depend upon her surviving the perils of childbirth. We must therefore reject the theory that there was a vested future interest in Mrs. Chater or an implied gift to her child in the event of her death prior to January 1, 1913. As to the dividends, the gift of these must likewise be treated as contingent upon her surviving to receive them; for it was not even a gift in terms, but only a direction to pay them to her during the three years from January 1, 1910.

The main purpose, as expressed, was to hold the principal fund until January 1, 1913, when, if Mrs. Chater were living and had a living child or children, she should decide for herself whether to take the fund into her own hands or allow the trustee to continue to hold it for her benefit; but if she had no child living, the trustee was to hold the fund, giving her the income only, and at her death dividing the fund among her sisters, etc.,—"my object being, as Mr. Chater will observe, that as to these additional shares they shall remain in my family."

Mrs. Chater was the chief object of the bounty. What she was to receive, and when she was to receive it, were stated in plain terms. Beyond this, we think there are none of the implications that are deemed to arise in cases of wills.

But the event that happened—her death before January 1, 1910—although evidently in contemplation as a possible event, was not provided for. What then happens? The trust has failed; the trustee is *functus officio;* he cannot in equity retain the fund for himself; he must simply redeliver it to him from whom it came. In other words, there is a resulting trust for the donor.

The entire matter is so fully and satisfactorily discussed in the opinion of the Supreme Court of Hawaii that we need not further elaborate it.

Decree affirmed.

BRAND *v.* UNION ELEVATED RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 268. Argued May 6, 7, 1915.—Decided June 21, 1915.

Nothing in the Federal Constitution gives any one the right to have the jury instructed that he is entitled to damages for property taken, where the instruction is not based on some evidence or entitles him to damages without proof.

After an elevated railroad had been built in a street, the jury, in a suit brought by an abutting owner, viewed the premises, and the only testimony showed that the property was worth more after, than before, the erection of the structure; *held*, that the owner was not entitled to an instruction that the jury must exclude from their estimate of market value subsequent to the construction any enhancement from the facilities furnished to the property by the structure

itself, in the absence of any direct evidence as to whether any such enhancement exists.

By simply viewing property after the erection of an elevated structure in front of it, a jury cannot, in the absence of any evidence other than that the property is worth more than before the structure was built, ascertain what the market value was either before or just after the erection of the structure.

258 Illinois, 133, affirmed.

THE facts, which involve the right of an abutting property owner to recover damages for depreciation of his property by reason of the erection of an elevated railroad in the street, are stated in the opinion.

Mr. Harry S. Mecartney and *Mr. John S. Miller* for plaintiff in error.

Mr. Roger L. Foote, with whom *Mr. Addison L. Gardner*, *Mr. Randall W. Burne* and *Mr. Francis W. Walker* were on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

By ordinary warranty deed from Calvin F. Rice, dated November 13, 1889, Edwin L. Brand became owner in fee simple of a lot, with five-story building (No. 259), fronting east on Wabash Avenue, described as follows: "The North Twenty-five (25) feet of Lot five (5) in Block seven (7) in Fractional Section Fifteen (15) Addition to Chicago." The record reveals no other facts concerning any rights acquired by the grantee who held possession until his death in 1900; and there is nothing to show how or conditions under which the City obtained and holds the street. Proceeding under a city ordinance the Union Elevated Railroad Company and other defendants during 1896 and 1897 caused construction of a double-track

elevated railroad along the center of Wabash Avenue (100 feet wide); and since October 3, 1897, have operated the same.

On October 2, 1902, plaintiffs—Brand's executors—commenced this common law action to recover a lump sum for damage consequent upon construction, permanent maintenance and operation of the railroad in front of the above-described premises. After alleging such construction, method of operation, noise, dust, dirt, vibration and other objectionable results the declaration concludes: "All of which said disturbances and injuries and grievances above complained of, have continued from and since, to-wit, said October 3, 1897, hitherto, and have caused and are now causing and will henceforth continue to cause a great and permanent damage and injury to said premises and building and said rights and easements therein, and by means thereof the said real estate has been greatly reduced in market value, to-wit, in the sum of Twenty-five thousand dollars ($25,000).

"And the plaintiffs aver that said defendants became and are bound to make full compensation to plaintiffs for the said loss and damage under the Constitution and Laws of the State of Illinois; but the said defendants, though often requested, have not, nor has any or either of them, paid said loss and damage or any part thereof, but hitherto have wholly neglected and refused and still neglect and refuse to do so, to the damage of said plaintiffs of Twenty-five thousand dollars ($25,000); wherefore they bring this suit."

Twelve years after the road was put into operation and seven after institution of the cause it was brought on for hearing—November, 1909—upon a plea of not guilty. Before the premises were viewed or any evidence taken, plaintiffs' counsel in his opening statement outlining facts and issues said: "They allege and claim that the premises known as No. 259 Wabash Avenue, owned by

Mr. Brand in his lifetime, and this cause of action surviving to them as executors of his estate; that that property has been damaged in its market value by the construction of the Elevated railroad structure in front of the premises for public railroad uses. . . . The law as it will be given to you, as we understand it, is that under the Constitution of Illinois . . . private property shall not be taken or damaged for public use without just compensation, and we sue under that clause of the Constitution and upon the idea, and the basis, as we expect the law to be given to you, that notwithstanding the City Ordinance allowed the construction of the road that that is no bar to our recovery if damages have been in fact sustained. Damages in the eye of the law is damage to the market value of the property, usually arising from some interference with the private enjoyment or use of the property. . . . The theory is that this structure was built for public uses by the companies organized under the Railroad act of Illinois; . . . but it is a railroad in a street and upon a structure which is violative of the ordinary rights of the abutter in the street, unless in some way they can show some particular, special, immediate, well-defined benefit to that property itself. . . . The theory of the law is that so far as public works are concerned, if a damage is created to the property the property owner recovers in one lump sum for the damage, past, present and future. . . . Now we expect the evidence—and your view of the premises will be, as we think, the most important thing in the case—the actual, physical structure and its mode of operation and the noise and racket and pandemonium, as we would call it, that the road makes in front of the premises; the more or less obstruction to light and other inconvenience—some inconvenience of access and egress for wagons, and all that, all affecting the use of the property, and as we think, that will appear to you to be self-evident and the damage

prima facie established; and then it will be for the opposition, if they can in any way show to you that there are any particular special benefits to this property apart from property generally and apart from the general travel convenience which this property had a right to after the road was established."

Without objection, the jury viewed the premises; Brand's title was established by deed from Rice and right of plaintiffs to sue by their letters, etc.; copy of ordinance granting authority for construction of the railroad was put in evidence, and also street sketch showing outline and location of rails, supports, etc. Plaintiffs introduced a single witness, engaged in the real estate business, who had been agent for the property and collector of the rents since prior to the road's construction. He testified concerning the locality, the property, character of improvements, building of the road in 1896–7, operation, noise, dirt, obstruction to light, etc., resulting therefrom and the effect, the rents received, market conditions of lands in Chicago, the advance therein about 1898, etc. He declared the property's market value was $4800 per front foot before and for three years after the construction, and somewhat later increased to $6500. They also endeavored to prove by him values on Michigan Avenue to the east and on State Street to the west, but this was declared inadmissible. On defendants' motion the court directed a verdict of not guilty, stating the following reasons therefor: "Now I agree fully with your [counsel for plaintiffs] contention that the measure of damages is the difference in the value of the property in question with the structure and that without the structure. But how is that measured? What is the basis of measure of those damages? Why, it is the price before the construction and the price immediately afterwards. That is the readiest and most available test of determining whether or not there was damage. If there was testimony here that

without the structure it would be worth so much and with the construction it would be worth so much less, that would be another question from that which is presented here. Your claim is not for depreciation of the value of the land by reason of the structure but because the structure has prevented its appreciation. It is not for deterioration of value but because the value has not advanced. Although the value has not advanced, it has not been proven by the evidence and there is no evidence tending to prove it did not advance by reason of the erection of this structure. *Non constat* that the structure was erected, there may have been many reasons that the value of the property did not advance and the only affirmative evidence in the case is that immediately before the erection of the structure, the price was so much and that for a period of some years afterwards, the price was so much. There is no evidence of depreciation at all. There is no evidence of right of appreciation which depended upon the erection of the structure and therefore I think you have not made out a case."

The judgment of the trial court was affirmed by both the Appellate Court (169 Ill. App. 449) and Supreme Court of Illinois (258 Illinois, 133). The latter in the course of its opinion said (p. 134): "Numerous errors were assigned in the Appellate Court, but counsel for appellants stated in his brief that all of them were withdrawn except those raising the question of the correct rule for assessing damages to property not taken but affected by a public use, and this is the only question discussed in the briefs in this court. . . . [p. 135] The undisputed evidence, therefore, was that the market value of appellants' property was not depreciated by the construction of the road. It is claimed, however, that this was the result of general benefits common to all property in the neighborhood served by the improvement, and that such benefits should not be considered in determining the dam-

ages; that only special benefits, such as are a direct physical improvement to the property, like the draining of a wet, swampy tract of land by the improvement, or building a bridge across a stream running through the land, which enables the owner to enjoy it with greater advantage by reason of the improvement, should be considered in determining whether the property is damaged. Appellants contend that the benefits to their property by reason of the improvement which operated to prevent a decrease in its market value were general benefits; that there were no special benefits, but, on the contrary, the improvement injuriously affected the use of appellants' property by obstructing air and light, by noise and vibration, and by interference with access to their property, and they insist they are entitled to recover the damage thus resulting without any reference to the other benefits that may have resulted from the improvement. This question is not a new one in this State. Since the adoption of our present constitution [1870] and the passage of the Eminent Domain act [1872] the question has been passed upon by this court a great many times. . . . In all three of these cases it was held the true measure of compensation for land not taken by the improvement was the difference between what the property would have sold for unaffected by the improvement, and what it would sell for as affected by it. . . . [p. 136] The rule announced in those cases has, with one exception, been followed in subsequent cases, down to *Metropolitan West Side Elevated Railway Company* v. *Stickney* [1894], 150 Illinois, 362, . . . [in which] "the court reviews all its previous decisions since the adoption of the constitution of 1870 and sums up its conclusions in the following language: 'It therefore follows that every element arising from the construction and operation of the railroad or other public improvement which in an appreciable degree, capable of ascer-

tainment in dollars and cents, enters into the diminution or increase of the value of the particular property, is proper to be taken into consideration in determining whether there has been damage, and the extent of it.' . . . [p. 137] Appellants insist this decision and others in line with it are wrong; that the rule adopted in this State is contrary to the weight of authority in other States; . . . also, that the rule is in conflict with *Keithsburg and Eastern Railroad Company* v. *Henry*, 79 Illinois, 290, and § 9 of the Eminent Domain act. It is quite true, the decisions in this State upon the question here under consideration are not in harmony with decisions of courts of last resort in some of our sister States, while they are in harmony with the decisions in some States. The conflict between the decisions in this State and the decisions of other States relied upon by appellants is not so much as to a rule of law as it is to the application of the rule. This court is in accord with the cases in other States holding that only special benefits are to be considered in making just compensation for land damaged by but not taken for a public use. The difference is principally as to what are general benefits and what are special benefits. Some courts hold that only those benefits are special which directly and physically operate upon the particular property in a manner different from and not shared in common by other property in the neighborhood and which enable the owner to use it with greater advantage. All other benefits which increase the market value of the particular property in common with other property in the neighborhood are held to be general benefits. This view has not been adopted in this State. . . . [p. 139] The only case in this State that is out of line with the *Stickney Case* and those previously and subsequently decided is *Keithsburg and Eastern Railroad Company* v. *Henry*, *supra*, and that case has not been followed in any sub-

sequent decision. . . . [p. 141] We are not disposed now to enter upon a discussion of the correctness of the rule adhered to for forty years, nor do we feel at liberty, even if we were so inclined, to overrule the large number of decisions that would have to be overruled to justify a reversal of this judgment. The judgment is in harmony with the law in this State, and is therefore affirmed."

The Illinois constitution of 1870 provides—"Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law." The Eminent Domain Act of 1872, chap. 47, Rev. Stat. Ills. 1912, pp. 1099, 1101, provides—(Sec. 1) "That private property shall not be taken or damaged for public use without just compensation; and that in all cases in which compensation is not made by the State in its corporate capacity, such compensation shall be ascertained by a jury, as hereinafter prescribed." (Sec. 9) "Said jury shall . . . go upon the land sought to be taken or damaged, . . . and after hearing the proof offered make their report in writing, . . . so as to clearly set forth and show the compensation ascertained to each person thereto entitled; *Provided,* that no benefits or advantages which may accrue to lands or property affected shall be set off against or deducted from such compensation in any case."

Counsel delimit plaintiffs' present position thus:—

"Appellants withdraw all and every their assignments of error or parts thereof as will leave open upon this record this one question, and will save all their legal and constitutional rights claimed in respect thereto, viz: Assuming that the evidence adduced on the trial and shown in this record tended inevitably and only to show that the property in question was worth as much after the railroad in question had been constructed as before

it was constructed, or as much with the railroad constructed as without it, that the cause should still have gone to the jury. Or, differently worded: That in considering the effect upon the premises in question from the railroad structure in question, the jury must exclude from consideration the enhancement in value of the property in question, if any, resulting from the facilities furnished by the improvement."

The suit is for loss in market value consequent upon erection and operation of the elevated road and is now prosecuted upon the theory that the trial judge erred in not submitting questions of damage to the jury under positive instruction to exclude from market value subsequent to the construction such enhancement, if any, as resulted from facilities furnished by the improvement itself. It was, of course, necessary for the court to determine whether there was any evidence upon which such loss could be found. By merely viewing the property in 1909 the jury could not ascertain its market value either before or just after the road was built, and the only testimony relating thereto showed no change occurred. Neither could the jury tell without evidence what enhancement, if any, resulted from the improvement, and the record discloses none. In the circumstances we think the refusal to give positive direction to exclude from consideration something impossible of ascertainment was clearly right.

What we have said disposes of the essential point presented by the record, and it is unnecessary to consider the broad questions discussed in argument. It may not be contended upon any theory of compensation that the Constitution of the United States gave plaintiffs the right to an instruction not based on some evidence or to damages without proof. The judgment of the court below is

Affirmed.

MR. JUSTICE DAY, dissenting.

I am unable to agree with the opinion of the court in this case. I think its importance justifies a brief statement of the grounds upon which my dissent rests.

In this case there was testimony tending to show that the plaintiffs' property suffered a real and substantial damage by the erection and maintenance of the elevated railroad, and that their property right of ingress and egress was peculiarly and particularly injured by the railroad structure. Such damage was equivalent to a taking of property for a public use and required just compensation to be made for the injury sustained. *Washington Ice Co.* v. *Chicago*, 147 Illinois, 327. There is no question of the real and substantial special injury to the plaintiffs' property, shown by the testimony, and undoubtedly developed by the view of the premises which the jury had under the direction of the court. In this attitude of the case, the jury was instructed that the plaintiff could not recover; the court proceeding upon the theory that there was no testimony tending to show that plaintiffs' property would not sell for as much after the construction of the road as before. The necessary effect of this instruction permitted the jury to consider appreciation in value arising from the general advantage of the structure, not only to the plaintiff, but to others of the public, similarly situated.

In the Supreme Court of Illinois this instruction was sustained upon the theory that the damages to the property might be offset by benefits to the owner although such benefits were shared by all others similarly situated.

This court has more than once held that to take private property for public use without adequate compensation is a deprivation of due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution. *Chicago, Burlington & Quincy R. R.* v. *Chicago*, 166 U. S. 226; *Backus* v. *Fort Street Union Depot Co.*, 169

U. S. 557, 565. It has also held that just compensation, in the constitutional sense, excludes taking into account the supposed benefits that the owner may receive in common with the public from the use to which his property is appropriated. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 326.

Nor is it any answer to say that the proceedings in this case are in accordance with the laws of the State, in a proceeding in which the plaintiffs were allowed to appear and be heard, according to the rules of the local jurisdiction. This contention was made and met by this court in *Chicago, B. & Q. R. R.* v. *Chicago*, 166 U. S. 226, and this court has uniformly held that if the effect of the State's judgment was to permit the taking of property without due process of law, the form by which that result is accomplished is of no moment, and the mere form of the proceeding, even if accompanied by full opportunity to be heard, does not convert such process into due process of law, if the necessary result has been to deprive complainant of his property without just compensation. *Chicago, B. & Q. R. R.* v. *Chicago*, 166 U. S., p. 236, and the cases therein cited; *Fayerweather* v. *Ritch*, 195 U. S. 276, 297. If the effect of the judgment of the state court has been to take the property of the citizen without compensation, no matter what form the procedure has taken, it is violative of the Fourteenth Amendment to the Constitution. If this were not so, the State, by adopting forms of procedure and enforcing laws which operated to take private property without compensation, could deny the citizen the protection which the Fourteenth Amendment was intended to give against all forms of state action.

If the jury were permitted to pay the plaintiffs for their special damage in general benefits enjoyed by the public as well as the plaintiffs, the result is inevitable that the plaintiffs' property was taken without compensation. In

my view, the rule was correctly summarized by Justice Cartwright in his dissenting opinion in this case. In my opinion, he tersely and correctly stated the case in the following words:

"In this case damage was claimed to property by the occupation of a public street with an elevated railroad. There were two classes of rights in the street; the one, the public right to use the street for travel and for that only; the other, the right of the property owner of ingress and egress, use in connection with his property and the appurtenant easements. If there was an obstruction to the public use for travel by the iron pillars, there could be no recovery by the owner for consequent damage, but if his right of access was impeded or interfered with or his property rendered less valuable on account of noise, vibration or other natural consequence of the construction and maintenance of the road, the damage resulting was special to that property. The thing would be a nuisance if there were no authority of law for its construction and operation, and whenever an act is done which without statutory authority would be a nuisance, the owner of property affected by it sustains a special and peculiar damage different from that sustained by the public in general and may have his action for damages resulting from his individual and distinct right. (*Rigney* v. *City of Chicago*, 102 Illinois, 64.) In this case there was a direct physical disturbance of a right enjoyed in connection with the ownership of property, and if there was any damage by reason of the disturbance of the right it was special. Against any such damage general benefits to the public, although enhancing the value of the property in question in common with other property in the vicinity could not be considered. To say that the only test is the market value of the property before and after the improvement, regardless of the causes affecting the value, necessarily charges the owner with benefits which this court has re-

peatedly held could not be done, and makes the owner contribute to a liquidation of special injuries his share of the general benefits derived from the construction and operation of the road."

As the effect of the judgment below was to permit the plaintiffs to be paid for valuable property rights in general benefits, in my opinion it necessarily follows that plaintiffs' property was taken without due process of law, and therefore in violation of the protection afforded by the Fourteenth Amendment.

MR. JUSTICE MCKENNA, MR. JUSTICE LAMAR and MR. JUSTICE PITNEY concur in this dissent.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. LESLIE, ADMINISTRATOR OF OLD.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 538. Argued April 22, 1915.—Decided June 21, 1915.

Under the Employers' Liability Act as amended in 1910 and § 28, Judicial Code, a cause brought in a state court of competent jurisdiction under the Employers' Liability Act cannot be removed to a Federal court upon the sole ground of diversity of citizenship.

Under the Employers' Liability Act as amended in 1910 there can be a recovery for pecuniary loss to the widow and children of decedent and also for conscious pain and suffering endured by decedent in the period, even though brief,—in this case about two hours—between injury and death. *St. Louis, Iron Mtn. & Southern Ry.* v. *Craft*, 237 U. S. 648.

Even though the declaration may set up distinct and independent liabilities springing from one wrong—as for the suffering endured before death and the death itself—in an action under the Employers' Liability Act, in the state court the jury need not, if it is in accord

with local practice, specify the different amounts awarded for the suffering before death and the death itself.

Under the Employers' Liability Act the recovery of pecuniary damages by the personal representative of the deceased is in trust for the beneficiaries designated by the act and must be based upon their actual pecuniary loss.

112 Arkansas, 305, reversed.

THE facts, which involve the validity of a verdict and judgment for damages for personal injuries obtained in an action under the Federal Employers' Liability Act, are stated in the opinion.

Mr. James B. McDonough, with whom *Mr. Samuel W. Moore* and *Frank H. Moore* were on the brief, for plaintiff in error.

Mr. W. P. Feazel for defendant in error:

No Federal question arises in the denial of the petition for removal.

There was no denial of any Federal question or immunity in the refusal to direct a verdict for plaintiff in error.

There was no denial of any Federal right in refusing instructions.

The claim of the Federal right or immunity arising from the refused instructions is too general and indefinite to give this court jurisdiction.

The claim of immunity set forth in the requested instructions is not granted by the Acts of Congress referred to or by the rules or orders of the Interstate Commerce Commission.

There is another and independent ground of negligence adequate to sustain the judgment.

There was no denial of any Federal right in any instructions given nor do the rulings of the court in regard thereto or to admitting and excluding testimony involve

any Federal question. There was no denial of any Federal right in excluding rules of the Interstate Commerce Commission as evidence.

There was no denial of any Federal rights in refusing to disturb the verdict on either of these grounds.

An excessive verdict does not involve a Federal question.

No question as to the form of the verdict was raised or decided in the lower court.

General objections to instruction on measure of damages are not sufficient to raise the question that the infant child was permitted to recover damages after maturity.

As to the failure of the jury to apportion damages, that question is not raised or decided by the lower court.

Numerous authorities of this and other courts support these contentions.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

In May, 1913, Sam E. Leslie, administrator, brought this suit under the Federal Employers' Liability Act (35 Stat. 65), as amended April 5, 1910 (36 Stat. 291), against the Kansas City Southern Railway Company in the Circuit Court, Little River County, Arkansas, alleging that the injury and death of Leslie Old (March 24, 1913) resulted from its negligence, and demanding $10,000 for pain and suffering endured by deceased and $15,000 pecuniary damage to the wife and young child. The Company unsuccessfully sought to remove the case; there was trial to a jury and verdict for $25,000 without apportionment, a *remittitur* of $7,000, and a final unqualified judgment in favor of the administrator for $18,000, which the Supreme Court of Arkansas affirmed (112 Arkansas, 305). Three substantial assignments of error demand consideration.

1. The deceased and his administrator were citizens and residents of Arkansas. The Railway Company, a Missouri corporation, seasonably set up non-residence and demanded removal of the cause to the United States District Court. Its petition therefor was denied and this is now assigned as error.

The above-mentioned amendment of 1910 declares: "The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." Section 28, Judicial Code, effective January 1, 1912, specifies causes removable from state courts by non-resident defendants and concludes: "*Provided*, That no case arising under an act entitled 'An act relating to the liability of common carriers by railroad to their employés in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any state court of competent jurisdiction shall be removed to any court of the United States." The language of both amendment and Judicial Code, we think, clearly inhibits removal of a cause arising under the Act from a state court upon the sole ground of diversity of citizenship. The same conclusion has been announced frequently by lower Federal courts. *Symonds* v. *St. Louis &c. Ry.*, 192 Fed. Rep. 353, 356; *Strauser* v. *Chicago &c. R. R.*, 193 Fed. Rep. 293, 294; *Saiek* v. *Penna. R. R.*, 193 Fed. Rep. 303; *Lee* v. *Toledo &c. Ry.*, 193 Fed. Rep. 685, 686; *Ullrich* v. *N. Y., N. H. & H. Ry.*, 193 Fed. Rep. 768, 770; *Hulac* v. *Chicago &c. Ry.*, 194 Fed. Rep. 747, 749; *McChesney* v. *Illinois Central R. R.*, 197 Fed. Rep. 85, 87; *De Atley* v. *Chesapeake & Ohio Ry.*, 201 Fed. Rep. 591, 596; *Kelly's Adm'x* v. *Chesapeake & Ohio Ry.*, 201 Fed. Rep. 602, 605; *Rice* v. *Boston & Maine R. R. Co.*, 203 Fed. Rep. 580, 581; *Teel* v. *Chesapeake &*

O. Ry. of Virginia, 204 Fed. Rep. 918, 921; *Patton* v. *Cincinnati &c. Ry.*, 208 Fed. Rep. 29, 30; *Eng* v. *Southern Pacific Co.*, 210 Fed. Rep. 92, 93; *Burnett* v. *Spokane &c. Ry.*, 210 Fed. Rep. 94, 95. A different view expressed in *Van Brimmer* v. *Tex. & Pac. Ry.*, 190 Fed. Rep. 394, decided October, 1911, cannot be accepted.

2. It is said the court below erred in approving the charge permitting recovery for pecuniary loss to widow and child and also for conscious pain and suffering endured by deceased in the brief period—less than two hours—between injury and his death. This point having been considered the right to recover for both these reasons in one suit was recently sustained. *St. Louis, Iron Mtn. &c. Ry.* v. *Craft*, 237 U. S. 648 [announced June 1, 1915].

It is further objected that as the declaration set up two distinct and independent liabilities springing from one wrong but based upon different principles, the jury should have been directed to specify in their verdict the amount awarded, if any, in respect of each. This objection must be overruled. Of course, in causes arising under this statute trial courts should point out applicable principles with painstaking care and diligently exercise their full powers to prevent unjust results; but its language does not expressly require the jury to report what was assessed by them on account of each distinct liability, and in view of the prevailing contrary practice in similar proceedings we cannot say that a provision to that effect is necessarily implied. As the challenged verdict seems in harmony with local practice and has been approved by the courts below the judgment thereon is not open to attack here upon the ground specified.

3. Complaint is also made of the following instruction—No. 10—given at the administrator's instance: "If you find for the plaintiff, you should assess the damages at such sum as you believe from a preponderance of the evidence would be a fair compensation for the con-

scious pain and suffering, if any, the deceased underwent from the time of his injury until his death and such further sum as you find from the evidence will be a fair and just compensation with reference to the pecuniary loss resulting from decedent's death to his widow and child; and in fixing the amount of such pecuniary loss, you should take into consideration the age, health, habits, occupation, expectation of life, mental and physical disposition to labor, the probable increase or diminution of that ability with the lapse of time and the deceased's earning power and rate of wages. From the amount thus ascertained the personal expenses of the deceased should be deducted and the remainder reduced to its present value should be the amount of contribution for which plaintiff is entitled to recover, if your verdict should be for the plaintiff." The Arkansas Supreme Court expressly approved this upon authority of *Railway Co.* v. *Sweet*, 60 Arkansas, 550. Recent opinions of this court have laid down the rule concerning the measure of pecuniary damages to beneficiaries which may be recovered under the Act. A recovery therefor by the administrator is in trust for designated individuals and must be based upon their actual pecuniary loss. *Michigan Cent. R. R.* v. *Vreeland*, 227 U. S. 59, 68; *American Railroad* v. *Didricksen*, 227 U. S. 145, 149; *Gulf, Colorado &c. Ry.* v. *McGinnis*, 228 U. S. 173, 175; *North Carolina R. R.* v. *Zachary*, 232 U. S. 248, 256, 257; *Norfolk & Western Ry.* v. *Holbrook*, 235 U. S. 625, 629. Instruction No. 10 conflicts with the approved rule and the probable result was materially to prejudice plaintiff in error's rights.

The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

OPINIONS PER CURIAM, ETC., FROM JANUARY 12, 1915, TO JUNE 21, 1915.

No. ——. Original. *Ex parte:* IN THE MATTER OF JAMES J. FLETCHER ET AL., PETITIONERS. Motion for leave to file petition for writ of *habeas corpus* submitted January 25, 1915. Decided February 1, 1915. Motion for leave to file petition for writ of *habeas corpus* denied. *Mr. Henry E. Davis* and *Mr. James A. O'Shea* for the petitioners. *The Solicitor General* opposing.

No. 148. SOUTHERN EXPRESS COMPANY, PLAINTIFF IN ERROR, *v.* EMIL J. STEHLI ET AL. In error to the Supreme Court of the State of North Carolina. Argued for plaintiff in error January 25, 1915. Decided February 23, 1915. *Per Curiam.* Judgment reversed with costs, and case remanded for further proceedings upon the authority of *Adams Express Company* v. *Croninger*, 226 U. S. 491; *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469; *Kansas Southern Railway* v. *Carl*, 227 U. S. 639; *Chicago, Rock Island & Pacific Railway* v. *Cramer*, 232 U. S. 490; *Seaboard Air Line* v. *J. M. Pace Mule Co.*, 234 U. S. 751. *Mr. Robert C. Alston* for the plaintiff in error. No appearance for the defendants in error.

No. 335. PETER H. ANDERSON ET AL., PLAINTIFFS IN ERROR, *v.* NELS O. HULTBERG ET AL. In error to the Supreme Court of the State of Illinois. Motion to dismiss or transfer to summary docket submitted January 25, 1915. Decided February 23, 1915. *Per Curiam.*

Dismissed for the want of jurisdiction upon the authority of *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Consolidated Turnpike* v. *Norfolk &c. Railway*, 228 U. S. 596, 600; see *White Star Mining Co.* v. *Hultberg*, 205 U. S. 540; *Anderson et al.* v. *Swedish Evangelical Mission Covenant of America et al.*, 235 U. S. 692. *Mr. Axel Chytraus*, *Mr. John J. Healy* and *Mr. E. Allen Frost* for the plaintiffs in error. *Mr. John Barton Payne*, *Mr. Silas H. Strawn*, *Mr. Harris F. Williams* and *Mr. James Hamilton Lewis* for the defendants in error.

No. 509. Seaboard Air Line Railway, Plaintiff in Error, *v.* Ella M. Thornton, as Administratrix, etc. In error to the Supreme Court of the State of South Carolina. Argued February 24, 1915. Decided March 1, 1915. *Per Curiam.* Judgment reversed with costs, and cause remanded for further proceedings upon the authority of *Seaboard Air Line* v. *Horton*, 233 U. S. 492. *Mr. J. J. Darlington* for the plaintiff in error. *Mr. William N. Graydon* for the defendant in error.

No. 168. The People of the State of Illinois ex rel. John B. Gaskill, Plaintiffs in Error, *v.* Forest Home Cemetery Company of Chicago et al. In error to the Supreme Court of the State of Illinois. Argued March 4, 1915. Decided March 8, 1915. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of (1) *Eustis* v. *Bolles*, 150 U. S. 361; *Yazoo & Miss. R. R.* v. *Brewer*, 231 U. S. 245, 249; *Holden Land Co.* v. *Interstate Trading Co.*, 233 U. S. 536, 541; (2) *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Consol. Turnpike* v. *Norfolk &c. Ry.*, 228 U. S. 596, 599–600;

Ennis Water Works v. *Ennis*, 233 U. S. 652, 658. *Mr. George W. Wilbur* for the plaintiffs in error. *Mr. Walter D. Herrick* for the defendants in error.

No. 171. GEORGE W. CALDWELL ET AL., PLAINTIFFS IN ERROR, *v.* CARL E. BAUER ET AL. In error to the Supreme Court of the State of Indiana. Argued March 4 and 5, 1915. Decided March 8, 1915. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of (1) *Eustis* v. *Bolles*, 150 U. S. 361; *Yazoo & Miss. R. R.* v. *Brewer*, 231 U. S. 245, 249; *Holden Land Co.* v. *Interstate Trading Co.*, 233 U. S. 536, 541; (2) *Chesapeake & Ohio Ry.* v. *McDonald*, 214 U. S. 191, 193; *Seaboard Air Line* v. *Duvall*, 225 U. S. 477, 481; *Rowe* v. *Scott*, 233 U. S. 658, 663, 664; *Cleveland & Pittsburgh R. R.* v. *Cleveland*, 235 U. S. 50. *Mr. Wm. J. Whinery* and *Mr. Addison C. Harris* for the plaintiffs in error. *Mr. Frank N. Gavit* and *Mr. John H. Gillett* for the defendants in error.

No. 789. MAX G. COHEN, APPELLANT, *v.* THE UNITED STATES. Appeal from the District Court of the United States for the Western District of Washington. Motion to dismiss or affirm submitted March 3, 1915. Decided March 8, 1915. *Per Curiam.* Final order affirmed upon the authority of *Kaizo* v. *Henry*, 211 U. S. 146, 148; *Harlan* v. *McGourin*, 218 U. S. 442, 445, 448; *Glasgow* v. *Moyer*, 225 U. S. 420, 428, 429; *Henry* v. *Henkel*, 235 U. S. 219, 229; see *Cohen* v. *United States*, 235 U. S. 696. *Mr. Thomas Mannix* for the appellant. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the appellee.

No. —. Original. *Ex parte:* IN THE MATTER OF HELEN C. SHECKELS, PETITIONER. Motion for leave to file petition for writ of mandamus submitted March 8, 1915. Decided March 15, 1915. Motion for leave to file petition for writ of mandamus denied. *Mr. John Raum* for the petitioner.

No. 201. LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* L. M. RHODA, AS ADMINISTRATOR OF THE ESTATE OF CLARENCE RHODA, DECEASED. In error to the Supreme Court of the State of Florida. Argued March 16, 1915. Decided April 12, 1915. *Per Curiam.* Judgment reversed upon the authority of *Michigan Central R. R.* v. *Vreeland,* 227 U. S. 59; *American Railroad of Porto Rico* v. *Didricksen,* 227 U. S. 145; *Gulf, Colorado, &c. Ry.* v. *McGinnis,* 228 U. S. 173; *Garrett* v. *Louisville & Nashville R. R.,* 235 U. S. 308. *Mr. A. C. Blount, Mr. W. A. Blount, Mr. Benjamin D. Warfield* and *Mr. Henry L. Stone* for the plaintiff in error. *Mr. W. H. Watson* for the defendant in error.

No. 731. EDWARD A. PETERS, APPELLANT, *v.* HENRY L. FERRIS & HUNT, HELM, FERRIS & Co. Appeal from the District Court of the United States for the Eastern District of Wisconsin. Motion to dismiss submitted April 5, 1915. Decided April 12, 1915. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Covington* v. *First National Bank,* 185 U. S. 270; *Heike* v. *United States,* 217 U. S. 423; *United States* v. *Beatty,* 232 U. S. 463; see *Alexander* v. *United States,* 201 U. S. 117. *Mr. William G. Henderson* for the appellant. *Mr. Philip C. Dyrenforth, Mr. Francis M. Phelps* and *Mr. George A. Chritton* for the appellees.

No. 249. C. L. CARLISLE, PLAINTIFF IN ERROR, *v.* THE STATE OF SOUTH DAKOTA. In error to the Supreme Court of the State of South Dakota. Submitted April 16, 1915. Decided April 19, 1915. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Fay* v. *Crozer*, 217 U. S. 455; *Hendricks* v. *United States*, 223 U. S. 178, 184; see *Dent* v. *West Virginia*, 129 U. S. 114; *Reetz* v. *Michigan*, 188 U. S. 505; *Watson* v. *Maryland*, 218 U. S. 173; *Collins* v. *Texas*, 223 U. S. 288. *Mr. Melvin Grigsby* for the plaintiff in error. *Mr. Chas. O. Bailey*, *Mr. Royal C. Johnson* and *Mr. John H. Voorhees* for the defendant in error.

No. 762. F. B. CLARK, TRUSTEE IN BANKRUPTCY OF THE SMITH AUTOMOBILE COMPANY, A BANKRUPT, APPELLANT, *v.* CLAUDE HAMILTON. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss submitted April 12, 1915. Decided April 19, 1915. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Chapman* v. *Bowen*, 207 U. S. 89; *Blake* v. *Openyhm*, 216 U. S. 322. *Mr. D. R. Hite* for the appellant. *Mr. Chas. M. Wilson* for the appellee.

No. 751. ERWIN R. BERGDOLL, PLAINTIFF IN ERROR, *v.* FRANK A. HARRIGAN, TRUSTEE, ETC. In error to the United States Circuit Court of Appeals for the Third Circuit. Motion to dismiss or affirm or place on the summary docket submitted April 19, 1915. Decided April 26, 1915. *Per Curiam.* Judgment affirmed with costs, upon the authority of rule 6, clause 5; *Micas* v. *Williams*, 104 U. S. 556; *The Alaska*, 130 U. S. 201; *Chanute City* v. *Trader*, 132 U. S. 210, 214; *Northern*

Pacific Railroad v. *Amato*, 144 U. S. 465, 473, and cause remanded to the District Court of the United States for the Eastern District of Pennsylvania. *Mr. Joseph Gilfillan* and *Mr. George S. Graham* for the plaintiff in error. *Mr. Joseph W. Catharine* for the defendant in error.

No. 252. THE BRUNER OIL COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* THE DEMING INVESTMENT COMPANY. In error to the Supreme Court of the State of Oklahoma. Submitted April 22, 1915. Decided April 26, 1915. *Per Curiam.* Judgment affirmed with costs upon the authority of *Skelton* v. *Dill*, 235 U. S. 206; *Adkins* v. *Arnold*, 235 U. S. 417. *Mr. George S. Ramsey* and *Mr. Edgar A. de Meules* for the plaintiffs in error. *Mr. A. J. Biddison* for the defendant in error.

No. 355. EDWARD ROBY, PLAINTIFF IN ERROR, *v.* SOUTH PARK COMMISSIONERS ET AL. In error to the Supreme Court of the State of Illinois. Motion to dismiss or affirm submitted April 26, 1915. Decided May 3, 1915. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Iowa Central Ry.* v. *Iowa*, 160 U. S. 389; *Texas & New Orleans R. R.* v. *Miller*, 221 U. S. 408, 416; *Brinkmeier* v. *Missouri Pacific Ry.*, 224 U. S. 268; *Washington* v. *Miller*, 235 U. S. 422, 429. *Mr. Edward Roby* for the plaintiff in error. *Mr. Robert Redfield, Mr. Chauncey W. Martyn* and *Mr. Charles L. Bartlett* for the defendants in error.

No. 254. BRUCE NEFF, PLAINTIFF IN ERROR, *v.* R. A. JACKSON, SHERIFF OF HILLSBORO COUNTY. In error

to the Supreme Court of the State of Florida. Submitted for the plaintiff in error May 4, 1915. Decided May 10, 1915. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Consolidated Turnpike* v. *Norfolk &c. Ry.*, 228 U. S. 596, 600; *Ennis Water Works* v. *Ennis*, 233 U. S. 652, 658; see *Hendrick* v. *Maryland*, 235 U. S. 610. *Mr. Benjamin Micou* and *Mr. Hilary A. Herbert* for the plaintiff in error. No appearance for the defendant in error.

No. 267. State Savings & Commercial Bank, Plaintiff in Error, *v.* Alden Anderson et al. In error to the Supreme Court of the State of California. Argued May 6, 1915. Decided May 10, 1915. *Per Curiam.* Judgment affirmed, with costs, upon the authority of *Engel* v. *O'Malley*, 219 U. S. 128; *Noble State Bank* v. *Haskell*, 219 U. S. 104. *Mr. C. M. Jennings* and *Mr. Arthur Crane* for the plaintiff in error. *Mr. A. A. De Ligne* and *Mr. U. S. Webb* for the defendants in error.

No. 467. Arizona Copper Company, Ltd., Plaintiff in Error, *v.* The State of Arizona at the Relation of and to the use of John M. Webster, Treasurer and ex officio Tax Collector in and for the County of Greenlee, State of Arizona. In error to the Supreme Court of the State of Arizona. Motion to dismiss or affirm submitted May 17, 1915. Decided June 1, 1915. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Eustis* v. *Bolles*, 150 U. S. 361; *Yazoo & Miss. V. R. R.* v. *Brewer*, 231 U. S. 245; *Holden Land Co.* v. *Interstate Trading Co.*, 233 U. S. 536. *Mr.*

Walter Bennett for the plaintiff in error. *Mr. George J. Stoneman* and *Mr. Reese M. Ling* for the defendant in error.

No. 812. W. G. WELLES ET AL., PLAINTIFFS IN ERROR, *v.* GEORGE E. BRYANT. In error to the Supreme Court of the State of Florida. Motion to dismiss or affirm and for damages submitted May 17, 1915. Decided June 1, 1915. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Thomas* v. *Iowa*, 209 U. S. 258; *Mallers* v. *Commercial Loan & Trust Co.*, 216 U. S. 613; *Appleby* v. *Buffalo*, 221 U. S. 524, 529; *Cleveland & Pittsburgh R. R.* v. *Cleveland*, 235 U. S. 50, 53. *Mr. Benjamin Micou* for the plaintiffs in error. *Mr. N. B. K. Pettingill* and *Mr. M. B. Macfarlane* for the defendant in error.

No. 329. THE AMERICAN WELL WORKS CO., APPELLANT, *v.* LAYNE & BOWLER CO. ET AL. Appeal from the District Court of the United States for the Eastern District of Arkansas. Motion to dismiss submitted May 10, 1915. Decided June 1, 1915. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Bevins* v. *Ramsey*, 11 How. 185; *Deland* v. *Platte County*, 155 U. S. 221; *Behn* v. *Campbell*, 205 U. S. 403, 407. *Mr. Frank Andrews* and *Mr. J. M. Moore* for the appellees. No brief filed for the appellant.

No. 310. T. U. VAUGHN, PLAINTIFF IN ERROR, *v.* THE STATE OF SOUTH CAROLINA. In error to the Supreme Court of the State of South Carolina. Motion to dismiss or affirm submitted June 14, 1915. Decided June 21,

1915. *Per Curiam.* Judgment affirmed upon the authority of (1) *Malloy* v. *South Carolina*, 237 U. S. 180; (2) *Overton* v. *Oklahoma*, 235 U. S. 31; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry.*, 228 U. S. 596; *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102. *Mr. Joseph A. McCullough* for the plaintiff in error. *Mr. Thomas H. Peeples* and *Mr. Fred H. Dominick* for the defendant in error.

No. 354. The United States ex rel. Frederick Brown, Appellant, *v.* Frederick A. Cooke, Superintendent of the County Prison at Philadelphia. Appeal from the United States Circuit Court of Appeals for the Third Circuit. Motion to dismiss or affirm submitted June 14, 1914. Decided June 21, 1915. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of § 241, Judicial Code; *Whitney* v. *Dick*, 202 U. S. 132; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *Kurtz* v. *Moffitt*, 115 U. S. 487, 498. *Mr. G. Edward Dickerson* for the appellant. *Mr. Thomas H. Peeples* and *Mr. Fred H. Dominick* for the appellee.

Decisions on Petitions for Writs of Certiorari from January 12, 1915, to June 21, 1915.

No. 725. Charles E. Houston et al., Petitioners, *v.* The United States. January 18, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Samuel H. Pyles, Mr. James B. Howe, Mr. Wickliffe B. Stratton, Mr. Alexander Britton, Mr. Evans Browne* and *Mr. Francis W. Clements* for the petitioners. *The Attorney General,*

The Solicitor General and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 755. ALASKA GASTINEAU MINING COMPANY, PETITIONER, *v.* ALASKA TREADWELL GOLD MINING COMPANY ET AL. January 18, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. K. R. Babbitt, Mr. Louis P. Shackelford* and *Mr. Albert Fink* for the petitioner. *Mr. Curtis H. Lindley, Mr. Henry Eickhoff* and *Mr. Harvey M. Friend* for the respondents.

No. 761. THE TRENTON OIL CLOTH & LINOLEUM COMPANY, PETITIONER, *v.* HENRY W. MUNROE ET AL. January 18, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Russell Lord Tarbox* for the petitioner. *Mr. Sol M. Stroock* for the respondents.

No. 753. SUSIE A. TYRRELL, AS ADMINISTRATRIX, ETC., PETITIONER, *v.* THE DISTRICT OF COLUMBIA. January 25, 1915. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. Levi H. David* and *Mr. Alexander Wolf* for the petitioner. *Mr. Conrad H. Syme* for the respondent.

No. 705. CHARLES M. MCMAHON ET AL., PETITIONERS, *v.* THE UNITED STATES. January 25, 1915. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. William E. Mason* and *Mr. James Scarlet* for the petitioners. *The Attorney General* and *The Solicitor General* for the respondent.

No. 747. NORFOLK SAND & GRAVEL CORPORATION, PETITIONER, *v.* OHIO LOCOMOTIVE CRANE COMPANY. January 25, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Thomas W. Shelton* for the petitioner. *Mr. William H. White, Jr.*, for the respondent.

No. 752. THE FORD MOTOR COMPANY, PETITIONER, *v.* DANIEL DONALDSON. January 25, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William Butler* for the petitioner. *Mr. George F. Hickey* for the respondent.

No. 767. AKTIESSELSKABET INGRID, ETC., OWNER, ET AL., PETITIONERS, *v.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY ET AL. January 25, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* and *Mr. John Munro Woolsey* for the petitioners. *Mr. Robert Thorne, Mr. William H. Button, Mr. Charles E. Miller* and *Mr. J. P. Laffey* for the respondents.

No. 770. MAX SCHAEFFER, TRADING AS MAX SCHAEFFER COMPANY, PETITIONER, *v.* OTIS A. MYGATT ET AL.

January 25, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Philip C. Dyrenforth, Mr. John H. Lee, Mr. George A. Chritton* and *Mr. Hillary C. Messimer* for the petitioner. *Mr. Howard Taylor* for the respondent.

No. 771. MAX SCHAEFFER, TRADING AS MAX SCHAEFFER COMPANY, PETITIONER, *v.* OTIS A. MYGATT ET AL. January 25, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Philip C. Dyrenforth, Mr. John H. Lee, Mr. George A. Chritton* and *Mr. Hillary C. Messimer* for the petitioner. *Mr. Howard Taylor* for the respondent.

No. 782. GOSHEN MANUFACTURING COMPANY, PETITIONER, *v.* HUBERT A. MYERS MANUFACTURING COMPANY ET AL. February 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Fred L. Chappell* for the petitioner. No appearance for the respondents.

No. 785. THE UNITED STATES, PETITIONER, *v.* NEW YORK & ORIENTAL STEAMSHIP COMPANY, LIMITED. February 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *The Attorney General* and *The Solicitor General* for the petitioner. *Mr. J. Parker Kirlin* and *Mr. John M. Woolsey* for the respondent. (See *post*, p. 646.)

No. 744. ALEXANDER ECCLES & COMPANY, PETITIONERS, *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY. February 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Howard S. Harrington* and *Mr. Oscar R. Houston* for the petitioner. *Mr. Gregory L. Smith* and *Mr. Henry L. Stone* for the respondent.

No. 766. HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, PETITIONER, *v.* THE UNITED STATES. February 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Cecil H. Smith* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 781. AUGUSTUS C. BUZBY, ETC., PETITIONER, *v.* KEYSTONE OIL & MANUFACTURING COMPANY. February 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edwin C. Brandenburg, Mr. Alvin H. Culver* and *Mr. Wells M. Cook* for the petitioner. *Mr. Francis W. Parker* and *Mr. Donald M. Carter* for the respondent.

No. 768. PACIFIC MAIL STEAMSHIP COMPANY, PETITIONER, *v.* ED SCHMIDT. February 23, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. George A. Knight* and *Mr. Charles J. Heggerty* for the petitioner. *Mr. John L. McNab* for the respondent.

No. 763. LOUIS LEONHARDT & COMPANY, PETITIONER, *v.* SOUTHERN RAILWAY COMPANY. February 23, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. G. W. Pickle* and *Mr. W. T. Kennerly* for the petitioner. *Mr. Claudian B. Northrop* and *Mr. Leon Jourolmon* for the respondent.

No. 788. THE CITY OF PHILADELPHIA, PETITIONER, *v.* WELSBACH STREET LIGHTING COMPANY OF AMERICA. February 23, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Michael J. Ryan* and *Mr. E. W. Lank* for the petitioner. No appearance for the respondent.

No. 797. BOSTON ELEVATED RAILWAY COMPANY, PETITIONER, *v.* PAUL BOYTON COMPANY. February 23, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Alexander Britton, Mr. Evans Browne* and *Mr. F. W. Clements* for the petitioner. *Mr. Samuel J. Elder, Mr. Hugh W. Ogden* and *Mr. William R. Sears* for the respondent.

No. 798. CHARLES T. DUNBAR, PETITIONER, *v.* ORLEANS-KENNER ELECTRIC RAILWAY COMPANY. February 23, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. Generes Dufour* for the petitioner. *Mr. T. M. Miller* for the respondent.

No. 705. CHARLES M. MCMAHON ET AL., PETITIONERS, *v.* THE UNITED STATES OF AMERICA. March 1, 1915. Amended petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. William E. Mason* and *Mr. James Scarlet* for the petitioners. *The Attorney General* and *The Solicitor General* for the respondent.

No. 783. ASHEPOO FERTILIZER COMPANY, PETITIONER, *v.* W. H. TOWNSEND ET AL. March 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George F. von Kolnitz* for the petitioner. *Mr. W. H. Townsend* for the respondents.

No. 787. ANDREW A. NICROSI, ETC., ET AL., PETITIONERS, *v.* JOHN B. NICROSI ET AL. March 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William Henry White* for the petitioners. *Mr. John M. Chilton* for the respondents.

No. 802. A. Y. JAMESON, PETITIONER, *v.* THE UNITED STATES FARM LAND COMPANY. March 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. M. H. Boutelle* and *Mr. Charles B. Elliott* for the petitioner. No appearance for the respondent.

No. 807. JAMES LANSBURGH ET AL., PETITIONERS, *v.* MYRON M. PARKER ET AL. March 1, 1915. Petition

for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Charles H. Merillat, Mr. Alexander Wolf* and *Mr. Levi H. David* for the petitioners. *Mr. J. J. Darlington* and *Mr. John Ridout* for the respondents.

No. 822. POCAHONTAS DISTILLING COMPANY, INCORPORATED, PETITIONER, *v.* THE UNITED STATES. March 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John A. Lamb* and *Mr. Robert H. Talley* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 801. ALI GEGIOW ET AL., PETITIONERS, *v.* BYRON H. UHL, AS ACTING COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK. March 8, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Abram I. Elkus, Mr. Max J. Kohler, Mr. Ralph Barnett* and *Mr. Morris Jablow* for the petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 816. CECELIA LUKENS POOLER ET AL., PETITIONERS, *v.* JENNIE HYNE; and

No. 817. CECELIA LUKENS POOLER ET AL., PETITIONERS, *v.* SILAS HYNE. March 8, 1915. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward H.*

Kubitz for the petitioners. *Mr. G. V. Menzies* for the respondents.

No. 827. FRISCO LUMBER COMPANY, PETITIONER, *v.* O. E. HODGE ET AL., ETC. March 8, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William T. Hutchings* for the petitioner. No appearance for the respondent.

No. 834. NEW YORK, SUSQUEHANNA & WESTERN R. R. Co., PETITIONER, *v.* ANNIE THIERER; and

No. 835. NEW YORK, SUSQUEHANNA & WESTERN R. R. Co., PETITIONER, *v.* JOSEPH THIERER. March 8, 1915. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederic B. Jennings* for the petitioners. *Mr. Abram J. Rose* for the respondents.

No. 825. THE HART STEEL COMPANY ET AL., PETITIONERS, *v.* THE RAILROAD SUPPLY COMPANY. March 15, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Frank F. Reed, Mr. Edward S. Rogers, Mr. Frederick P. Fish* and *Mr. Francis M. Phelps* for the petitioners. *Mr. Taylor E. Brown, Mr. Clarence E. Mehlhope* and *Mr. C. C. Linthicum* for the respondent.

No. 848. CARRIE CUSHMAN ET AL., PETITIONERS, *v.* WARREN-SCHARF ASPHALT PAVING COMPANY. March 15,

1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Marquis Eaton* and *Mr. Joseph H. Defrees* for the petitioners. *Mr. Morris M. Townley* for the respondent.

No. 622. W. S. TYLER COMPANY, PETITIONER, *v.* LUDLOW-SAYLOR WIRE COMPANY. March 22, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. D. Anthony Usina, Mr. J. N. Cooke* and *Mr. C. C. Linthicum* for the petitioner. *Mr. James P. Dawson* for the respondent.

No. 880. WILLIAM L. DAYTON, TRUSTEE, ETC., PETITIONER, *v.* A. H. STANARD, TREASURER, ETC., ET AL. April 12, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Harvey Riddell* for the petitioner. No appearance for the respondent.

No. 903. THE RAILROAD SUPPLY COMPANY, PETITIONER, *v.* ELYRIA IRON & STEEL COMPANY. April 12, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Taylor E. Brown, Mr. Charles C. Linthicum* and *Mr. Clarence E. Mehlhope* for the petitioner. No appearance for the respondent.

No. 794. AMERICAN BONDING COMPANY, OF BALTIMORE, MARYLAND, PETITIONER, *v.* ARTHUR H. BROWN, AS RECEIVER, ETC. April 12, 1915. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas J. Walsh*, *Mr. C. B. Nolan* and *Mr. William Scallon* for the petitioner. *Mr. Milton S. Gunn* for the respondent.

No. 883. HEDWIG FICHTEL ET AL., ETC., PETITIONERS, *v.* THE HESS-BRIGHT MANUFACTURING COMPANY ET AL. April 12, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Frederick P. Fish* and *Mr. Wm. A. Redding* for the petitioners. *Mr. Robert Fletcher Rogers* for the respondent.

No. 904. TRUSSED CONCRETE STEEL COMPANY, PETITIONER, *v.* THOMAS EWING, COMMISSIONER OF PATENTS. April 12, 1915. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Fred L. Chappell* and *Mr. Wm. S. Hodges* for the petitioner. No appearance for the respondent.

No. 910. CONTINUOUS GLASS PRESS COMPANY, PETITIONER, *v.* SCHMERTZ WIRE GLASS COMPANY ET AL. April 12, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Andrew C. Gray* and *Mr. A. B. Stoughton* for the petitioner. *Mr. Arthur J. Baldwin* and *Mr. Drury W. Cooper* for the respondents.

No. 875. MILTON OCHS, PETITIONER, *v.* THE COMMISSIONER OF PATENTS. April 19, 1915. Petition for a

writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Frederick Beller* for the petitioner. No appearance for the respondent.

No. 882. McKee Glass Company, Petitioner, *v.* The Libbey Glass Company. April 19, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Robert D. Totten* and *Mr. George E. Reynolds* for the petitioner. *Mr. Thomas Patterson* and *Mr. Otto Raymond Barnett* for the respondent.

No. 887. New Amsterdam Casualty Company, Petitioner, *v.* Lucy D. W. Mays. April 19, 1915. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Wade H. Ellis* and *Mr. R. Golden Donaldson* for the petitioner. No appearance for the respondent.

No. 888. Charles George Arbuthnot et al., Partners, etc., Petitioners, *v.* Central Trust Company of Illinois, etc., et al.;

No. 889. A. H. O. Dennistoun et al., Partners, etc., Petitioners, *v.* Central Trust Company of Illinois, etc., et al.; and

No. 890. Arthur Henry Brandt et al., Partners, etc., Petitioners, *v.* Central Trust Company of Illinois, etc., et al. April 19, 1915. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Timothy J. Scofield,*

Mr. John M. Zane and *Mr. Alfred T. Carton* for the petitioners. *Mr. Levy Mayer, Mr. Isaac H. Mayer* and *Mr. Wm. B. McIlvaine* for the respondents.

No. 907. JACK COLLINS, PETITIONER, *v.* THE UNITED STATES. April 19, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William O. Beall* and *Mr. R. Emmett Stewart* for the petitioner. No brief filed for respondent.

No. 919. THE WASHINGTON POST COMPANY ET AL., PETITIONERS, *v.* JAMES O'DONNELL. April 19, 1915. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. J. J. Darlington, Mr. Wilton J. Lambert* and *Mr. Rudolph H. Yeatman* for the petitioners. *Mr. Frank J. Hogan* and *Mr. D. W. Baker* for the respondent.

No. 920. PASCAL P. BEALS ET AL., PETITIONERS, *v.* PETER R. SLEIGHT, TRUSTEES, ETC., ET AL. April 19, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick S. Tyler* for the petitioners. *Mr. Albert H. Harris* and *Mr. Joseph Gilbert* for the respondents.

No. 921. FURNESS, WITHY & COMPANY, LTD., *v.* YANG-TSZE INSURANCE ASSOCIATION, LTD., ET AL. April 19, 1915. Petition for a writ of certiorari to the United

States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles C. Burlingham* and *Mr. Norman B. Beecher* for the petitioner. *Mr. James K. Simmers* and *Mr. J. Parker Kirlin* for the respondents.

Note. This order was vacated and set aside and writ of certiorari granted June 14, 1915. (See *post*, p. 634.)

No. 881. PREPAYMENT CAR SALES COMPANY, PETITIONER, *v.* ORANGE COUNTY TRACTION COMPANY. April 26, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Martin W. Littleton* and *Mr. Samuel E. Darby* for the petitioner. *Mr. Clarence P. Byrnes* and *Mr. Willard M. McEwen* for the respondent.

No. 867. HAMILTON INVESTMENT COMPANY, APPELLANT, *v.* IRVING L. ERNST, TRUSTEE, ETC. April 26, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Philip B. Adams* and *Mr. Henry J. Aaron* for the petitioner. *Mr. Emanuel J. Myers* for the respondent.

No. 893. THE CITY OF CHICAGO, PETITIONER, *v.* CHICAGO TRANSPORTATION COMPANY ET AL. April 26, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John W. Beckwith, Mr. Charles M. Haft* and *Mr. Samuel A. T. Watkins* for the petitioner. No appearance for the respondent.

No. 896. LOUIS TAPACK ET AL., PETITIONERS, *v.* THE UNITED STATES. April 26, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Merritt Lane* and *Mr. Robert Carey* for the petitioners. No brief filed for the respondent.

No. 917. JEFFERSON COUNTY, TENNESSEE, PETITIONER, *v.* THE OAK GROVE CONSTRUCTION COMPANY. April 26, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. G. W. Pickle* and *Mr. W. R. Turner* for the petitioner. *Mr. Leon Jourolmon* for the respondent.

No. 918. MEDLIN MILLING COMPANY, PETITIONER, *v.* HALL-BAKER GRAIN COMPANY. April 26 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George Thompson* and *Mr. D. T. Bomar* for the petitioner. *Mr. Joseph W. Bailey* for the respondent.

No. 908. KNAUTH, NACHOD & KUHNE, PETITIONERS, *v.* LATHAM & COMPANY ET AL. April 26, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Arthur von Briesen, Mr. Antonio Knauth* and *Mr. Thomas M. Stevens* for the petitioners. *Mr. Walker B. Spencer* and *Mr. Charles Payne Fenner* for the respondent.

No. 894. CHARLES T. SUDERMAN ET AL., ETC., PETITIONERS, *v.* FREDERICK LEYLAND & COMPANY, LTD.,

CLAIMANT. May 3, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James B. Stubbs* and *Mr. E. Hilton Jackson* for the petitioners. No appearance for the respondent.

No. 924. JOHN DENNETT, JR., ET AL., PETITIONERS, *v.* WILLIAM H. SAWTELLE, AS JUDGE, ETC. May 3, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. M. Seabury* for the petitioners. *Mr. George J. Stoneman* for the respondent.

No. 925. FARMERS & MERCHANTS BANK, PHŒNIX, PETITIONER, *v.* ARIZONA MUTUAL SAVINGS & LOAN ASSOCIATION ET AL. May 3, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. H. Stilwell* for the petitioner. No appearance for the respondent.

No. 939. THE CITY OF NEW YORK, PETITIONER, *v.* THE THIRD NATIONAL BANK OF JERSEY CITY. May 3, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. E. Crosby Kindleberger* for the petitioner. *Mr. L. Laflin Kellogg* for the respondent.

No. 928. OLAF LIE, MASTER OF THE NORWEGIAN STEAMSHIP SELJA, ETC., PETITIONER, *v.* SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, ETC. May 10, 1915. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Edmund B. McClanahan* and *Mr. L. Russell Alden* for the petitioner. *Mr. William Denman* and *Mr. E. J. McCutchen* for the respondent.

No. 934. PUGET SOUND ELECTRIC RAILWAY ET AL., PETITIONERS, *v.* NELLIE M. RININGER ET AL. May 10, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James B. Howe* for the petitioners. *Mr. Livingston B. Stedman* for the respondent.

No. 935. ROY MONTGOMERY, PETITIONER, *v.* THE UNITED STATES. May 10, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Daniel W. O'Donoghue* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 953. SOUTHERN PACIFIC COMPANY ET AL., PETITIONERS, *v.* DARNELL-TAENZER LUMBER COMPANY. May 10, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles N. Burch, Mr. H. D. Minor, Mr. Robert Dunlap, Mr. T. J. Norton, Mr. Blewett Lee, Mr. H. A. Scandrett* and *Mr. Fred H. Wood* for the petitioners. No appearance for the respondent.

No. 956. EDWARD L. MOSES, PETITIONER, *v.* THE UNITED STATES. May 10, 1915. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Leslie A. Gilmore* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 194. THE UNITED STATES EX REL. EDWARD L. CHOTT, PLAINTIFF IN ERROR, *v.* THOMAS EWING, COMMISSIONER OF PATENTS, ET AL. May 17, 1915. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Joshua R. H. Potts* for the petitioner. *The Attorney General* for the respondent. See 237 U. S. 197.

No. 836. ALBERT AMUNDSON, PETITIONER, *v.* N. J. FOLSOM, AS TRUSTEE, ETC. May 17, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William C. Hughes* for the petitioner. *Mr. Charles O. Bailey* and *Mr. John H. Voorhees* for the respondent.

No. 938. SANDUSKY PORTLAND CEMENT COMPANY, PETITIONER, *v.* DIXON PURE ICE COMPANY. May 17, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John S. Barker, Mr. Francis W. Parker, Mr. Donald M. Carter* and *Mr. Edward H. Brewster* for the petitioner. *Mr. Clyde Smith* for the respondent.

No. 941. BERNARD M. L. ERNST, AS TRUSTEE, ETC., PETITIONER, *v.* FIDELITY & DEPOSIT COMPANY OF MARY-

LAND ET AL. May 17, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry S. Dottenheim* and *Mr. John G. Johnson* for the petitioner. *Mr. Frank H. Platt* and *Mr. George W. Field* for the respondent.

No. 943. TACOMA RAILWAY & POWER COMPANY, PETITIONER, *v.* M. G. HENRY. May 17, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James B. Howe* for the petitioner. *Mr. Merritt J. Gordon* for the respondent.

No. 948. EDWARD N. PUGH ET AL., PETITIONERS, *v.* VICTOR LOISEL, TRUSTEE, ETC. May 17, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edward N. Pugh* and *Mr. Charlton R. Beattie* for the petitioners. *Mr. Edwin T. Merrick* for the respondent.

No. 951. HERMAN W. VAN SENDEN, PETITIONER, *v.* THE UNITED STATES. May 17, 1915. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Charles Poe* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 966. HANNIS TAYLOR, ADMINISTRATOR, ETC., PETITIONER, *v.* WILLIAM F. WHARTON, ADMINISTRATOR,

ETC., ET AL. May 17, 1915. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Daniel W. Baker* for the petitioner. *Mr. Frederick de C. Faust* and *Mr. Charles F. Wilson* for the respondent.

No. 969. CHARLES BENNER ET AL., PETITIONERS, *v.* NEW YORK CITY RAILWAYS COMPANY ET AL.; and

No. 970. THE CITY OF NEW YORK, PETITIONER, *v.* NEW YORK CITY RAILWAYS COMPANY ET AL. May 17, 1915. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Benjamin S. Catchings, Mr. Charles Benner, Mr. John R. Abney,* for the petitioners in No. 969. *Mr. E. Crosby Kindleberger* and *Mr. Terence Farley* for the petitioner in No. 970. *Mr. Chase Mellen, Mr. Julien T. Davies, Mr. Matthew C. Fleming, Mr. Richard Reid Rogers, Mr. Morgan J. O'Brien, Mr. Charles E. Rushmore, Mr. Brainard Tolles* for the respondents in No. 969. *Mr. Richard Reid Rogers, Mr. Matthew C. Fleming, Mr. Morgan J. O'Brien, Mr. Charles E. Rushmore, Mr. Chase Mellen, Mr. Arthur H. Masten* and *Mr. Wm. M. Chadbourne* for the respondents in No. 970.

No. 957. JAMES A. WHITCOMB, PETITIONER, *v.* GEORGE S. SHULTZ. June 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles F. Carusi, Mr. Walter B. Grant* and *Mr. Joseph M. Gazzam* for the petitioner. *Mr. Abram J. Rose* and *Mr. Alfred C. Pette* for the respondent.

No. 968. THE CHESAPEAKE & OHIO RAILWAY CO., PETITIONER, *v.* JEAN D. MCKELL, ADM'X, ETC. June 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Judson Harmon, Mr. Edward Colston* and *Mr. F. B. Enslow* for the petitioner. *Mr. John H. Holt* and *Mr. Murray Seasongood* for the respondent.

No. 976. SOUTHERN RAILWAY COMPANY, PETITIONER, *v.* E. B. KOGER, ADMINISTRATOR, ETC. June 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. L. E. Jeffries* for the petitioner. *Mr. G. W. Pickle, Mr. W. R. Turner* and *Mr. W. T. Kennerly* for the respondent.

No. 978. THE SHIPOWNERS & MERCHANTS TUG BOAT CO., ETC., PETITIONER, *v.* HAMMOND LUMBER COMPANY. June 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edward J. McCutchen* and *Mr. A. Crawford Greene* for the petitioner. *Mr. William Denman* for the respondent.

No. 979. CLAUDE A. P. TURNER, PETITIONER, *v.* JOHN L. DRUMM. June 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles J. Williamson* for the petitioner. *Mr. Amasa C. Paul* and *Mr. Edward Rector* for the respondent.

No. 988. PASCAL P. BEALS ET AL., PETITIONERS, *v.* THOMAS C. BURKE, TRUSTEE, ETC. June 1, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Lucas P. Loving* for the petitioners. *Mr. Thomas C. Burke* for the respondent.

No. 921. FURNESS, WITHY & COMPANY (LTD.), PETITIONER, *v.* YANG-TSZE INSURANCE ASSOCIATION (LTD.) ET AL. June 14, 1915. Order of April 19th denying petition for writ of certiorari vacated and set aside, and writ of certiorari granted. *Mr. Charles C. Burlingham* and *Mr. Norman B. Beecher* for the petitioner. *Mr. James K. Simmers* and *Mr. J. Parker Kirlin* for the respondents.

No. 949. CENTRAL TRUST COMPANY OF ILLINOIS ET AL., ETC., APPELLANTS, *v.* GEORGE LUEDERS & COMPANY ET AL. June 14, 1915. Petition for a writ of certiorari herein denied. *Mr. Judson Harmon, Mr. Edward Colston, Mr. A. W. Goldsmith, Mr. George Hoadly, Mr. Lessing Rosenthal* and *Mr. Charles H. Hamill* for the petitioners. *Mr. Walter A. De Camp* for the respondents.

No. 963. HILLS & COMPANY, PETITIONER, *v.* JOSEPH HOOVER ET AL. June 14, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Benno Loewy* for the petitioner. *Mr. William A. Carr* for the respondents.

No. 980. JAMES C. BLAIR, TRUSTEE, ETC., PETITIONER, *v.* JAMES S. BRAILEY, JR., ET AL., RECEIVERS, ETC. June

14, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Clarence Brown, Mr. Thomas H. Tracy* and *Mr. Alexander C. King* for the petitioner. *Mr. Max Isaac* and *Mr. Millard Reese* for the respondents.

No. 981. HERMAN KRUEGEL ET UX., PETITIONERS, *v.* STANDARD SAVINGS & LOAN ASSOCIATION ET AL. June 14, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Herman Kruegel pro se.* No appearance for the respondents.

No. 982. MORRIS FREUNDLICH ET AL., PETITIONERS, *v.* HARRY EISENBACH, TRUSTEE, ETC. June 14, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. David Steckler* for the petitioners. *Mr. Clayton J. Heermance* for the respondent.

No. 994. THE UNITED STATES OF AMERICA, PETITIONER, *v.* JOHN H. PATTERSON ET AL. June 14, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *The Attorney General, The Solicitor General* and *Mr. Assistant to the Attorney General Todd* for the petitioner. *Mr. Lawrence Maxwell, Mr. John S. Miller* and *Mr. John F. Wilson* for the respondents.

No. 1002. JOHN M. KUYKENDALL, PETITIONER, *v.* WILLIAM STEWART TOD. June 14, 1915. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William V. Hodges* for the petitioner. *Mr. Charles W. Burdick* for the respondent.

No. 1003. SIROCCO ENGINEERING COMPANY, PETITIONER, *v.* B. F. STURTEVANT COMPANY. June 14, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. L. S. Bacon, Mr. Arthur C. Fraser, Mr. Henry L. Stimson* and *Mr. Frederick P. Fish* for the petitioner. *Mr. Benjamin Phillips* and *Mr. Omri F. Hibbard* for the respondent.

No. 1006. THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, PETITIONER, *v.* MILDRED D. PRICE. June 14, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. William S. Jenney* and *Mr. Frederic B. Scott* for the petitioner. *Mr. James D. Carpenter, Jr.*, for the respondent.

No. 1008. F. DREW CAMINETTI, PETITIONER, *v.* THE UNITED STATES. June 14, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Joseph W. Bailey, Mr. Marshall B. Woodworth* and *Mr. Robert T. Devlin* for the petitioner. No brief filed for the respondent.

No. 1008. F. DREW CAMINETTI, PETITIONER, *v.* THE UNITED STATES. June 21, 1915. Order of June 14th

denying petition for writ of certiorari vacated and set aside and a writ of certiorari granted. *Mr. Joseph W. Bailey, Mr. Marshall B. Woodworth* and *Mr. Robert T. Devlin* for the petitioner. No brief filed for the respondent.

No. 1047. MAURY I. DIGGS, PETITIONER, *v.* THE UNITED STATES. June 21, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Joseph W. Bailey, Mr. Marshall B. Woodworth* and *Mr. Robert T. Devlin,* for the petitioner. No brief filed for the respondent.

No. 1033. THE UNITED STATES, PETITIONER, *v.* THE M. H. PULASKI CO., ET AL.;

No. 1034. THE UNITED STATES, PETITIONER, *v.* R. B. HENRY CO. ET AL.;

No. 1035. THE UNITED STATES, PETITIONER, *v.* JAMES ELLIOTT & CO. ET AL.;

No. 1036. THE UNITED STATES, PETITIONER, *v.* J. WILE SONS & CO.;

No. 1037. THE UNITED STATES, PETITIONER, *v.* ROBERT MULLER & CO.;

No. 1038. THE UNITED STATES, PETITIONER, *v.* WOOD & SELICK ET AL.;

No. 1039. THE UNITED STATES, PETITIONER, *v.* E. LA MONTAGNE'S SONS;

No. 1040. THE UNITED STATES, PETITIONER, *v.* ALBERT LORSCH & CO. ET AL.;

No. 1041. THE UNITED STATES, PETITIONER, *v.* CULLMAN BROS. ET AL.;

No. 1042. THE UNITED STATES, PETITIONER, *v.* G. W. FABER, INC.;

No. 1043. THE UNITED STATES, PETITIONER, *v.* LOUIS MEYERS & SON;

No. 1044. THE UNITED STATES, PETITIONER, *v.* WILLIAM OPPENHYM & SONS ET AL.;

No. 1045. THE UNITED STATES, PETITIONER, *v.* PARK & TILFORD; and

No. 1046. THE UNITED STATES, PETITIONER, *v.* SELGAS & Co. June 21, 1915. Petition for writs of certiorari to the United States Court of Customs Appeals granted. *The Attorney General* and *The Solicitor General* for the petitioner. *Mr. B. A. Levett, Mr. Allen R. Brown* and *Mr. Albert H. Washburn* for the respondents in No. 1033. *Mr. Albert H. Washburn* and *Mr. John A. Kratz* for the respondents in Nos. 1034, 1035 and 1036.

No. 942. DAN ULMER, PETITIONER, *v.* THE UNITED STATES. June 21, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Francis J. Wing* for the petitioner. No brief filed for the respondent.

No. 1004. JAMES J. FARMER, PETITIONER, *v.* THE UNITED STATES. June 21, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Benjamin C. Bachrach* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 1019. WILLIAM J. HARTLEY, PETITIONER, *v.* THE UNITED STATES. June 21, 1915. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Terence J. McManus* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 1007. ALLESANDRO BOLOGNESI ET AL., PETITIONERS, *v.* CASSA VALORI ET AL. June 21, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. A. S. Gilbert* for the petitioners. *Mr. Isidor F. Greene* for the respondent.

No. 1014. ELICK LOWITZ, PETITIONER, *v.* CHARLES H. KIMMERLE. June 21, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles M. Wilson* for the petitioner. *Mr. Harris F. Williams* for the respondent.

No. 1015. EDWARD THORNTON ROBINSON ET AL., PETITIONERS, *v.* POSTAL LIFE INSURANCE COMPANY. June 21, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John T. McGovern* and *Mr. Gilbert E. Roe* for the petitioners. *Mr. Crammond Kennedy* for the respondent.

No. 1020. CHARLES A. OTIS ET AL., PETITIONERS, *v.* PITTSBURGH-WESTMORELAND COAL COMPANY, June 21, 1915. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the Third Circuit denied. *Mr. William B. Sanders* and *Mr. Arthur O. Fording* for the petitioners. No brief filed for the respondent.

No. 1023. DANIEL A. FINLAYSON, PETITIONER, *v.* A. H. BARROWS, AS EXECUTOR, ETC., ET AL. June 21, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frederick T. Myers* for the petitioner. *Mr. T. L. Clarke* for the respondent.

No. 1024. AARON FIELDS ET AL., PETITIONERS, *v.* THE UNITED STATES. June 21, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. S. H. Sutherland* for the petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 1025. THE UNITED STATES EX REL. JOHN W. DWIGGINS, PETITIONER, *v.* THOMAS EWING, COMMISSIONER OF PATENTS. June 21, 1915. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. William S. Hodges* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Warren* for the respondent.

No. 1028. ADAM MCARTHUR ET AL., PETITIONERS, *v.* CITIZENS BANK OF NORFOLK, VIRGINIA. June 21, 1915.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Fred Beall*, *Mr. J. A. MacLean, Jr.*, and *Mr. Angus M. McLean* for the petitioners. *Mr. R. W. Winston* for the respondent.

No. 1030. FREDERICK W. FINLEY ET AL., PETITIONERS, *v.* HENRY D. HOTCHKISS, TRUSTEE, ETC. June 21, 1915. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles P. Howland* for the petitioners. *Mr. Abram I. Elkus* and *Mr. William A. Barber* for the respondent.

No. 1049. D. G. FRITZLEN, PETITIONER, *v.* BOATMEN'S BANK OF ST. LOUIS, MISSOURI; and

No. 1050. D. G. FRITZLEN ET UX., PETITIONERS, *v.* BOATMEN'S BANK OF ST. LOUIS, MISSOURI. June 21, 1915. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. D. R. Hite* and *Mr. Arthur A. Birney* for the petitioners. *Mr. James S. Botsford* and *Mr. Buckner F. Deatherage* for the respondents.

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No. 131. ELIZA K. SNEED, PLAINTIFF IN ERROR, *v.* JOHN S. SNEED. In error to the Superior Court of Cochise County, State of Arizona. January 14, 1915. Dis-

missed with costs, pursuant to the tenth rule. *Mr. Allen R. English* for the plaintiff in error. No appearance for the defendant in error.

No. 306. SPOKANE & INLAND EMPIRE RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* SPOKANE COUNTY ET AL. In error to the Supreme Court of the State of Washington. January 28, 1915. Dismissed on motion of counsel for the plaintiff in error. *Mr. B. B. Adams* for the plaintiff in error. No appearance for the defendants in error.

No. 280. LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLANT, *v.* THE UNITED STATES ET AL. Appeal from the United States Commerce Court. March 1, 1915. Decree reversed upon confession of error, and cause remanded to the District Court of the United States for the Western District of Kentucky for further proceedings in conformity to law, on motion of *Mr. Solicitor General Davis* for the United States. *Mr. Henry L. Stone* and *Mr. William A. Colston* for the appellant. *The Attorney General, The Solicitor General* and *Mr. Charles W. Needham* for the appellees.

No. 297. THE UNITED STATES OF AMERICA EX REL. WILLIAM N. PRENDER, PLAINTIFF IN ERROR, *v.* OLIVER P. NEWMAN ET AL., COMMISSIONERS, ETC. In error to the Court of Appeals of the District of Columbia. March 2, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. C. C. Tucker* for the plaintiff in error. No appearance for the defendants in error.

No. 186. NAMPA & MERIDIAN IRRIGATION DISTRICT, PLAINTIFF IN ERROR, *v.* CITY OF NAMPA ET AL. In error to the Supreme Court of the State of Idaho. March 5, 1915. Dismissed with costs, on authority of counsel for the plaintiff in error. *Mr. J. M. Thompson* for the plaintiff in error. No appearance for the defendants in error.

No. 188. HOLLAND CITY GAS COMPANY, APPELLANT, *v.* THE CITY OF HOLLAND. Appeal from the District Court of the United States for the Western District of Michigan. March 9, 1915. Dismissed with costs, on authority of counsel for the appellant. *Mr. Robert I. Wykes* for the appellant. *Mr. Arthur Van Duren* for the appellee.

No. 375. P. J. CARLIN CONSTRUCTION COMPANY, PLAINTIFF IN ERROR, *v.* GUERINI STONE COMPANY. In error to the District Court of the United States for Porto Rico. March 19, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Francis H. Dexter* for the plaintiff in error. *Mr. Edward S. Paine* for the defendant in error.

No. 536. CHUN KIM, APPELLANT, *v.* SAMUEL W. BACKUS, COMMISSIONER OF IMMIGRATION, ETC. Appeal from the District Court of the United States for the Northern District of California. April 5, 1915. Dismissed with costs, pursuant to the tenth rule. *Mr. Wm. Hoff Cook* for the appellant. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the appellee.

No. 535. THE STATE OF MONTANA EX REL. GENERAL ELECTRIC COMPANY, PLAINTIFF IN ERROR, *v.* A. M. ALDERSON, SECRETARY OF STATE OF THE STATE OF MONTANA. In error to the Supreme Court of the State of Montana. April 19, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. M. S. Gunn* for the plaintiff in error. No appearance for the defendant in error.

No. 328. ELSIE DE WOLFE, PLAINTIFF IN ERROR, *v.* CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK. In error to the District Court of the United States for the Northern District of Illinois. April 21, 1915. Dismissed without costs to either party, per stipulation of counsel. *Mr. W. Bourke Cockran* and *Mr. Colin C. H. Fyffe* for the plaintiff in error. *Mr. Levy Mayer* for the defendant in error.

No. 940. EMIGDIO TOLENTINO, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the Philippine Islands. April 26, 1915. Docketed and dismissed, on motion of *Mr. Assistant to the Attorney General Todd*, for the defendant in error. *The Attorney General* for the defendant in error. No one opposing.

No. 265. MARION A. MORSE, APPELLANT, *v.* SIDNEY A. BROWN, SHERIFF. Appeal from the District Court of the United States for the District of Connecticut. May 4, 1915. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles W. Comstock* for the appellant. *Mr. Charles B. Whittlesey* for the appellee.

No. 260. ALICE R. THAYER, APPELLANT, *v.* THE CITY OF BOSTON ET AL. Appeal from the District Court of the United States for the District of Massachusetts. May 5, 1915. Dismissed per stipulation. *Mr. Nathan Matthews* for the appellant. *Mr. John A. Sullivan* for the appellees.

No. 276. LAS VEGAS RAILWAY & POWER COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* THE TRUST COMPANY OF ST. LOUIS COUNTY, TRUSTEE. In error to the Supreme Court of the State of New Mexico. May 7, 1915. Dismissed with costs, pursuant to the tenth rule. *Mr. John D. W. Veeder, Mr. William B. Thompson* and *Mr. Ford W. Thompson* for the plaintiffs in error. *Mr. Charles A. Spiess* for the defendant in error.

No. 972. DULUTH & NORTHERN MINNESOTA RAILWAY COMPANY, APPELLANT, *v.* THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois. May 10, 1915. Docketed and dismissed, on motion of *Mr. Solicitor General Davis* for the appellee. *The Attorney General* for the appellee. No one opposing.

Nos. 312 and 313. W. FRANK JORDAN, PLAINTIFF IN ERROR, *v.* FIDELITY SAVINGS & TRUST COMPANY, INC. In error to the Supreme Court of Appeals of the State of Virginia. May 10, 1915. Dismissed, each party to pay its own costs in this court, per stipulation. *Mr. Sigmund M. Brandt* for the plaintiff in error. *Mr. Frank S. Bright* for the defendant in error.

No. 295. MOKE MAKAIWI ET AL., PLAINTIFFS IN ERROR, *v.* THE TERRITORY OF HAWAII. In error to the Supreme Court of the Territory of Hawaii. May 14, 1915. Dismissed with costs, pursuant to the tenth rule. *Mr. R. P. Quarles* for the plaintiffs in error. *Mr. C. R. Hemenway* for the defendant in error.

No. 433. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* THE NATIONAL CREAMERY COMPANY. In error to the District Court of the United States for the Western District of Missouri. May 17, 1915. Dismissed on motion of *Mr. Solicitor General Davis* for the plaintiff in error. *The Attorney General* for the plaintiff in error. No appearance for the defendant in error.

No. 785. THE UNITED STATES, PETITIONER, *v.* NEW YORK & ORIENTAL STEAMSHIP COMPANY, LIMITED. On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. May 17, 1915. Dismissed on motion of *Mr. Solicitor General Davis* for the petitioner. *The Attorney General* and *The Solicitor General* for the petitioner. *Mr. J. Parker Kirlin* and *Mr. John M. Woolsey* for the respondent.

No. 990. WILLIE BETHUNE, PLAINTIFF IN ERROR, *v.* THE STATE OF SOUTH CAROLINA. In error to the Supreme Court of the State of South Carolina. May 17, 1915. Docketed and dismissed with costs, on motion of *Mr. Fred H. Dominick* for the defendant in error. *Mr. Fred H. Dominick* for the defendant in error. No one opposing.

No. 867. HAMILTON INVESTMENT COMPANY, APPELLANT, *v.* IRVING L. ERNST, TRUSTEE, ETC. Appeal from the United States Circuit Court of Appeals for the Second Circuit. June 1, 1915. Dismissed with costs, per stipulation. *Mr. Philip D. Adams* and *Mr. Henry J. Aaron* for the appellant. *Mr. Emanuel J. Myers* for the appellee.

No. 531. MARTHA S. PAINTER ET AL., PLAINTIFFS IN ERROR, *v.* THE UNITED STATES FIDELITY & GUARANTY COMPANY. In error to the Court of Appeals of the State of Maryland. June 14, 1915. Dismissed with costs, on motion of counsel for the plaintiffs in error. *Mr. Arthur L. Jackson* for the plaintiffs in error. No appearance for the defendant in error.

No. 550. MAIER-WATT REALTY COMPANY, PLAINTIFF IN ERROR, *v.* QUAKER REALTY COMPANY, LIMITED. In error to the Supreme Court of the State of Louisiana. June 14, 1915. Dismissed per stipulation, costs to be paid by the plaintiff in error. *Mr. E. Howard McCaleb* for the plaintiff in error. *Mr. William Winans Wall* for the defendant in error.

No. 760. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* CLARA SHARP, ADM'X, ETC. In error to the Supreme Court of the State of Arkansas. June 14, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. E. B. Kinsworthy* and *Mr. Troy Pace* for the plaintiff in error. No appearance for the defendant in error.

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V. **Commerce clause.**

Provisions of law of Illinois of 1907, prohibiting sale of food preservatives containing boric acid, not unconstitutional under commerce clause as to sales within State of articles involved in action in packages in which sold. *Price* v. *Illinois*. 446

VI. **Fifth Amendment.**

Order requiring carrier to extend to connecting carriers, as to competitive business, same switching facilities as it extends to some of other connecting carriers, in regard to same class of business, not violative of due process under Fifth Amendment, nor violative of § 15 of Commerce Act. *Louisville & Nashville R. R.* v. *United States* 1

Requiring railroads to provide means for water passing under embankments not taking of property without compensation but application of maxim *sic utere tuo alienum non lædas*. *Chicago & Alton R. R.* v. *Tranbarger* 67

Nothing in Constitution gives one right to have jury instructed that he is entitled to damages for property taken, where instruction not based on some evidence or entitles him to damages without proof. *Brand* v. *Union Elevated R. R.*. 586

VII. **Fourteenth Amendment.**

1. *Generally:* Enforcement of uncompensated obedience to legitimate police regulation not repugnant to Amendment. *Chicago & Alton R. R.* v. *Tranbarger* 67

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2. *Due process of law:* Police statute not unconstitutional under due process clause because innocuousness of prohibited article is debatable. *Price* v. *Illinois*. 446

Statute providing that surety, by executing undertaking to release property attached, is bound by judgment against principal, not unconstitutional as denial of due process of law. *United Surety Co.* v. *American Fruit Co*. 140

In estimating amount of premiums paid by residents of State as basis for taxation of insurance companies by State, those paid to foreign companies outside of State may be included without depriving such companies of their property without due process of law. *Equitable Life Society* v. *Pennsylvania*. 143

Section 10322, Mo. Rev. Stat. 1909, requiring officers of corporations to file affidavit as to non-participation of corporation in pool, trust, etc., under penalty of forfeiture of charter or right to do business in State, not unconstitutional as depriving corporation of its property without due process of law. *Mallinckrodt Works* v. *St. Louis*. 41

In absence of impairment of contract obligation, exercise by municipality of lawful power to fix rates does not deprive public utility of property without due process of law where it does not appear that rates are confiscatory. *Milwaukee Electric Ry.* v. *Wisconsin R. R. Comm*. 174

Order of state commission requiring railroad to install and maintain scales amounts to taking of company's property, and, if arbitrary or unreasonable, the taking is without due process of law. *Great Northern Ry.* v. *Minnesota*. 340

Wisconsin statute imposing penalties on sleeping car companies if, lower berth being occupied, upper let down before actually engaged, is unconstitutional under due process of law clause as arbitrary taking of property without compensation. *Chicago, M. & St. P. R. R.* v. *Wisconsin* 491

Prohibition against sale of food preservative containing boric acid not deprivation of property without due process of law. *Price* v. *Illinois*. 446

Provisions of law of Illinois of 1907, prohibiting sale of food preservatives containing boric acid, not unconstitutional under Amendment. *Id.*

To enforce against telephone company penalty for refusing to furnish service to subscriber who is delinquent on past rates and refuses to pay in advance in accordance with established rule uniformly enforced, amounts to depriving it of

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its property without due process of law. *Southwestern Tel. Co.* v. *Danaher* 482

For State to authorize individual to take salable property from another without pay amounts to deprivation of property without due process of law. *Chicago, M. & St. P. R. R.* v. *Wisconsin* 491

3. *Equal protection of the laws:* Police regulation subject to equal protection clause of Constitution. *Atchison, T. & S. F. Ry.* v. *Vosburg* 56

There is a reasonable basis for classifying corporations on account of their peculiar attributes in regard to participation in prohibited combinations and practices of that motive. *Mallinckrodt Works* v. *St. Louis* 41

Legislature may estimate degrees of evil and adjust its legislation according to existing exigency, and may prohibit sale of particular articles within bounds of reasonable classification. *Price* v. *Illinois* 446

State legislature may prohibit sale of food preservatives containing boric acid without offending equal protection provision of Constitution. *Id.*

Statute providing for disposition of surface water, otherwise legal, not unconstitutional under Amendment because it applies exclusively to railroad embankments. *Chicago & Alton R. R.* v. *Tranbarger* 67

State statute imposing reciprocal burdens on both carrier and shipper and providing for recovery of attorney's fee as against carrier but not as against shipper, denies former equal protection of the law, the classification being an unreasonable one. *Atchison, T. & S. F. Ry.* v. *Vosburg* 56

Section 10322, Mo. Rev. Stat. 1909, requiring officers of corporations to file affidavit as to non-participation of corporation in pool, trust, etc., under penalty of forfeiture of charter or right to do business in State, not unconstitutional as denying equal protection of the law. *Mallinckrodt Works* v. *St. Louis* 41

Provisions of law of Illinois of 1907, prohibiting sale of food preservatives containing boric acid, not unconstitutional under Amendment. *Price* v. *Illinois* 446

VIII. **Fifteenth Amendment.**

While Amendment does not confer right of suffrage on any class, it does prohibit States from depriving any person of that right, whether for Federal, state or municipal elections. *Myers* v. *Anderson* 368

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Amendment does not, in general sense, take from States power over suffrage possessed from the beginning, but does restrict power of United States or States to abridge or deny right of citizen to vote on account of race, color or previous condition of servitude. *Guinn* v. *United States* 347
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While Amendment gives no right of suffrage, as its command is self-executing, rights of suffrage may be enjoyed by reason of the striking out of discriminations against exercise of the right. *Id.*

Provisions in state constitution recurring to conditions existing before adoption of Fifteenth Amendment and continuance of which the Amendment prohibited, and making such conditions test of right to suffrage, are void. *Guinn* v. *United States*. 347

Grandfather Clause of Oklahoma constitution and of Maryland statute of 1908 violative of Amendment. *Guinn* v. *United States*. 347
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IX. **Elective Franchise.**

Section 19, Crim. Code, is constitutional and extends protection to right to vote for members of Congress and to have the vote when cast counted. *United States* v. *Mosley* 383

X. **Ex post facto laws.**

In action for damages under Missouri statute requiring owners of railroads to maintain ditches along right of way as amended in 1907 so as to require outlets for water across rights of way and imposing liability and penalties for non-compliance within three months after completion and where embankment causing damage has been erected more than three months prior to the amendment; held, that the amendment was not an *ex post facto* law. *Chicago & Alton R. R.* v. *Tranbarger*. 67

XI. **Full Faith and Credit.**

Refusal of court, in action by owner of goods against carrier, to admit judgment obtained against carrier under which goods taken, on common law ground that notice of suit was not given to owner, does not amount to denial of full faith and credit. *Wells Fargo & Co.* v. *Ford*. 503

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covenant or condition, courts incline against latter. *Oregon & Cal. R. R.* v. *United States*. 393

First resort is language used; if that is plain there is an end to construction and statute is to be taken to mean what it says. *Adams Express Co.* v. *Kentucky*. 190

Reports of legislative committee having matter specially in charge, so far as they antedate statute, may be resorted to as aid to interpretation. *Woodward* v. *DeGraffenried*. 284

Where standards fixed for voters so interrelated that one cannot be held invalid without affecting others, entire provision fails. *Myers* v. *Anderson*. 368

Of Federal Statutes: Congress intended that Employers' Liability Act should be construed in light of prior decisions of Federal courts. *Central Vermont Ry.* v. *White*. 507

There can be given to land grant statutes no greater sanction than Congress intended, nor can there be given to parties rights which statutes did not confer upon them. *Oregon & Cal. R. R.* v. *United States*. 393

In absence of inconsistent expression, Congress attributed with tacit purpose to maintain long established and important distinction between offenses essentially different. *United States* v. *Rabinowich*. 78

Rights under provisions of a code, relative to *quo warranto*, determined according to special language used in light of general principles applicable to subject. *Newman* v. *Frizzell* 537

Of State Constitutions and Statutes: State statute that does not purport to be a health measure cannot be sustained as such. *Chicago, M. & St. P. R. R.* v. *Wisconsin*. . 491

Determination of whether application of state statute as construed by state courts is so arbitrary as to amount to deprivation of property without due process of law, is open in this court. *Southwestern Tel. Co.* v. *Danaher*. 482

Court accepts state court's construction of pure food statute and whether specified articles within, and then determines validity under Federal Constitution. *Price* v. *Illinois*. . . . 446

Suffrage and literacy tests in amendment of 1910 to constitution of Oklahoma so connected that unconstitutionality of former renders whole amendment invalid. *Guinn* v. *United States*. 347

Whether provision in suffrage statute may be valid under Federal Constitution, if it is so connected with other provisions that are invalid, as to make the whole statute unconstitutional may, in absence of decision by state court, be de-

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termined by this court in case coming from Federal courts. *Id.*
In advance of construction of statute by courts of enacting State, assumption that such courts will so construe [redacted] to render act constitutional. *Mallinckrodt Works* v. *St. Louis* .. 41
Time limit in state statute requiring railroads to provide outlets for water across rights of way should be construed as limited to railroads erected after passage of act, and that, as to those already constructed, reasonable time should be allowed. *Chicago & Alton R. R.* v. *Tranbarger*. 67
Of Contracts: Contract [redacted] to be interpreted according to its true intent, although varied conditions may have, during lapse of years, varied the form of fulfilment. *Virginia* v. *West Virginia* 202

CONTRACTS:
To be interpreted according to true intent, although varied conditions may have, during lapse of years, varied the form of fulfilment. *Virginia* v. *West Virginia* 202
In a contract between sovereign States questions of whether debtor party liable for interest on ascertainment of amount due, rate of interest and period from which to be computed, determined by fair intendment of contract itself. *Id.*
While State may make contracts preventing it, for given periods, from rate making, such renunciation must be clear and unequivocal. *Milwaukee Electric Ry.* v. *Wisconsin R. R. Comm.* 174
Contract between carrier mining coal and buying company taking all of product, to be not illegal must leave buyer free to extend its business elsewhere as it pleases and to otherwise act in competition with carrier. *United States* v. *Delaware, L. & W. R. R.*. 516

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Charters: Reserved right of altering and amending charter does not confer arbitrary power or authorize taking of property without compensation. *Chicago, M. & St. P. R. R.* v. *Wisconsin*. 491

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Even though charter irrepealable, common law rules existing at time of grant not so imported into contract as to be impaired by subsequent proper police regulations. *Chicago & Alton R. R.* v. *Tranbarger*. 67

Regulation: There is a reasonable basis for classifying corporations on account of their peculiar attributes in regard to participation in prohibited combinations and practices of that motive. *Mallinckrodt Works* v. *St. Louis* 41

Rates of public service corporations are fixed in expectation that they will be paid, and reasonable regulations tending toward prompt payment are necessary. *Southwestern Tel. Co.* v. *Danaher*. 482

Regulations requiring payment of rates of public service corporations in advance are not unreasonable, and a telephone company is not subject to penalties for refusing to render service to a subscriber who is delinquent on past rates and refuses to pay in advance in accordance with established rule uniformly enforced, nor because it charges full price to subscriber who does not pay in advance while allowing stated discount to those who do. To enforce against such company penalty for refusing to furnish service under such conditions amounts to deprivation of property without due process. *Id.*

Wisconsin statute imposing penalties on sleeping car companies if, lower berth being occupied, upper let down before actually engaged, not justified as health measure under police power, nor as amendment or alteration of charter of corporation under reserved power of State. *Chicago, M. & St. P. R. R.* v. *Wisconsin* 491

Section 10322, Mo. Rev. Stat. 1909, requiring officers of corporations to file affidavit as to non-participation of corporation in pool, trust, etc., under penalty of forfeiture of charter or right to do business in State, not unconstitutional as depriving corporation of its property without due process of law or as denying equal protection of the law. *Mallinckrodt Works* v. *St. Louis*. 41

Foreign: Whether corporation doing business within a district so as to have submitted itself to jurisdiction depends in each case upon the facts proved. *Washington-Virginia Ry.* v. *Real Estate Trust Co.* 185

Where corporation operates railroads, has its general office and keeps one of its bank accounts outside of State, but has an office in Federal District of State, where its president and

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treasurer reside, and in which it keeps bank accounts, held, that service of process within such District, upon its president, sufficient to give District Court jurisdiction. *Id.*

Generally: Corporation grantee of portion of grantor's property not privy to grantee of another portion, and judgment against latter in suit in which corporation not a party, although some of its officers as individuals had notice thereof and took some part in defense, is not *res judicata* if acts of officers not authorized by corporation. *Kapiolani Estate* v. *Atcherley*. 119

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COURTS:

Without authority to entertain action for damages alleged to have been inflicted by rule or method of car distribution for interstate shipments until Interstate Commerce Commission has passed upon its reasonableness. *Pennsylvania R. R.* v. *Clark Coal Co.*. 456

Where it appears that Commerce Act violated and requisite ruling as to unreasonableness of practice assailed made by Commission, § 9 applies and is exclusive, and shipper must elect between proceeding for reparation award before Commission or suit in Federal court; he cannot resort to state court. *Id.*

Establishment of literacy test for exercising suffrage is exercise by State of lawful power which is not subject to supervision by Federal courts. *Guinn* v. *United States* 347

Conformity Act not applicable to power of court to inquire into conduct of jurors. Courts of each jurisdiction must be in position to adopt and enforce own self-preserving rules. *McDonald* v. *Pless* 264

Court may change its action after an interlocutory decree and party to action may avail himself of such change, unless decision has finality of *res judicata*. *Kapiolani Estate* v. *Atcherley* 119

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In absence of inconsistent expression, Congress attributed, with tacit purpose to maintain long established and important distinction between offenses essentially different. *United States* v. *Rabinowich*. 78

Quære, whether crime of concealing assets, as defined in § 29b (1) of Bankruptcy Act, can be perpetrated by other than bankrupt. *Id.*

Error of trial court in misconstruing general order in Philippine Islands giving one accused of crime a specified time within which to plead, held not to vitiate proceedings and enlarge accused. *McMicking* v. *Schields* 99

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Election officers refusing to allow persons to exercise suffrage because of unconstitutional state law, liable in civil action under § 1979, Rev. Stat. *Myers* v. *Anderson* 368

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DEFENSES:

Substantive right or defense under Employers' Liability Act cannot be lessened or destroyed by state rule of practice. *Norfolk & Southern Ry.* v. *Ferebee*. 269

Carrier having goods of defendant in custody not bound to make defense to action of replevin and therefore is bound to give consignor notice. *Wells Fargo & Co.* v. *Ford* 503

DESCENT AND DISTRIBUTION:

Under laws of Creek Indians, husband, whether citizen or not, took half interest in wife's property if she died without children. *Woodward* v. *DeGraffenried*. 284

Under Original Creek Agreement interest of allottees under Curtis Act who had died before ratification of agreement

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descended according to Creek laws and not according to those of Arkansas. *Id.*
Equitable title to allotment made under Curtis Act to Creek female citizen who dies before ratification of Original Creek Agreement vested in her heirs under § 28 of the agreement; and, if not within excepted classes, was confirmed by § 6 to her heirs to be determined by Creek laws of descent. *Id.*
Decisions of state court regarding descent of property, the earliest made within three years and after action commenced, not regarded as rule of property binding on this court. *Id.*

DISCHARGE IN BANKRUPTCY. See **Bankruptcy.**

DISTRICT COURTS. See **Jurisdiction, IV.**

DISTRICT OF COLUMBIA:
Jurisdiction under § 250 (6), Jud. Code, confined to construction of laws of general application throughout United States and does not include local laws. *United Surety Co.* v. *American Fruit Co.*. 140
Quære, whether under § 250 (3) Jud. Code, jurisdiction does not exist where constitutionality of statute of United States, whether general or local, is involved. *United Surety Co.* v. *American Fruit Co.*. 140
Sections 1538–1540 of Code, relative to *quo warranto*, are general and not local laws, and in case involving their construction this court has jurisdiction under § 250, Jud. Code. *Newman* v. *Frizzell*. 537
Sections 454, 455, of Code, not unconstitutional as depriving of property without due process of law. *United Surety Co.* v. *American Fruit Co.*. 140
Under Code *quo warranto* extends to all persons in District exercising any office, civil or military. *Newman* v. *Frizzell*. . 537
Under Code, third person may not institute *quo warranto* proceedings without consent of law officers of Government and Supreme Court of District. *Id.*
The Code makes a distinction between " third person " and " interested person." *Id.*
The general interest of a citizen and taxpayer is not sufficient to authorize the institution of *quo warranto* proceedings. *Id.*
Citizen and taxpayer as such may not maintain *quo warranto* proceedings against incumbent of office on consent of court but without that of law officers of Government. *Id.*

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Interested person within meaning of provisions of Code is one who has an interest in the office peculiar to himself, whether the office be elective or appointive. *Id.*

DIVERSITY OF CITIZENSHIP. See **Jurisdiction; Removal of Causes.**

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EJECTMENT:
In action brought by United States where result depended upon validity of probate and registration of the deeds under which the Government claimed, held, that such deeds were valid and properly probated and registered, and passed title. *United States* v. *Hiawassee Lumber Co.*. 553

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EMPLOYERS' LIABILITY ACT:
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Contributory negligence as defense: In action under Act, burden of proof as to whether employé guilty of contributory negligence is matter of substance depending on that statute, and not matter of mere state procedure. *Central Vermont Ry.* v. *White* 507

Damages recoverable: Recovery extends to pecuniary loss to widow and children of decedent and for conscious pain and suffering of decedent in period between injury and death. *Kansas City Southern Ry.* v. *Leslie.* 599

Recovery of pecuniary damages by personal representative is in trust for beneficiaries designated by act and must be based upon their actual pecuniary loss. *Id.*

Congress intended not to require that jury apportion damages in case of death by negligence. *Central Vermont Ry.* v. *White* 507

Pleading and practice: Granting partial new trial in actions under Act not commended. *Norfolk & Southern Ry.* v. *Ferebee.* 269

Substantive right or defense under Act cannot be lessened or destroyed by state rule of practice, and ordinarily damages and contributory negligence are so blended that only in rare instances can question of amount of damages be submitted to jury without also submitting conduct of plaintiff. *Id.*

Where, however, defendant did not ask for modification of special verdict, returned under state practice, finding defendant negligent and that plaintiff not guilty of contributory negligence, nor offer to introduce newly discovered evidence, nor offer any such evidence on partial new trial limited to amount of damages, question of damages could be considered without also considering plaintiff's contributory negligence. *Id.*

Held not error for court to refuse to direct verdict for defendant on ground that proof failed to show negligence in allowing faster freight train to run into slower one in front of it, engineer of former having received notice that track was clear and that it might proceed, the evidence being sufficient to support verdict. *Central Vermont Ry.* v. *White* 507

In action under Act, ruling of state court as to effect of

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amendments and replications are matters of state pleading and practice and are binding on this court. *Id.*
Where verdict increased by inclusion as beneficiaries of parties not entitled, defendant may raise question in manner appropriate under practice of trial court. *Id.*
Under Act as amended and § 28, Jud. Code, case brought in state court of competent jurisdiction under former, cannot be removed to Federal court upon sole ground of diversity of citizenship. *Kansas City Southern Ry.* v. *Leslie* 599
Jury need not, if it is in accord with local practice, specify different amounts awarded for the suffering before death and the death itself. *Id.*

EQUAL PROTECTION OF THE LAWS:
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Court of equity reluctant to lend aid to enforce forfeiture. *Oregon & Cal. R. R.* v. *United States* 393
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Under the law in force in Oklahoma in 1900, where decedent's estate was less than $300, it vested absolutely in the widow, and where probate court had so decided grantee of widow took good title, whether order of such court was made before or after purchase of property in question. *Perryman* v. *Woodward* 148
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That actions of railroads in connection with lands granted were known to government officials and that no action was

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In attacking existing freight rate burden is on complainant to show unreasonableness in fact. *Louisville & Nashville R. R.* v. *United States* 1
Burden of proof is on public utility corporation to show regulating ordinance has effect to deprive it of fair return on property dedicated to public use. *Des Moines Gas Co.* v. *Des Moines* 153
In action under Employers' Liability Act, burden of proof as to whether employé guilty of contributory negligence is matter of substance depending on that statute, and not matter of mere state procedure. *Central Vermont Ry.* v. *White* 507
In action to recover property as a preference, burden of proof is upon trustee in bankruptcy. *Pyle* v. *Texas Transport Co.* 90
In suit on judgment after defendant's discharge in bankruptcy burden on plaintiff to show that judgment not identical claim scheduled. *Kreitlein* v. *Ferger* 21
Quære as to where burden under § 17 (3) of Bankruptcy Act lies. *Kreitlein* v. *Ferger* 21
Testimony of jurors may not be received to prove misconduct of himself or colleagues in reaching verdict. *McDonald* v. *Pless* 264
In proving market value, accredited price-currents, lists and market reports, including those published in trade journals and newspapers which are considered trustworthy, are admissible. *Virginia* v. *West Virginia* 202
Equity rules 75–77 call for presentation of only relevant evidence and exhibits; elimination of reduplication; and condensation into narrative form. *Louisville & Nashville R. R.* v. *United States* 1
Omission of evidence from record commendable on appeal under act of Oct. 22, 1913. *Id.*
Under § 21, Bankruptcy Act, certified copy of discharge is

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evidence of jurisdiction of court making it, of regularity of proceedings, and that order was made. *Kreitlein* v. *Ferger* 21
While introduction of order in discharge may make out *prima facie* defense, case may be disposed of by showing from bankruptcy record that debt scheduled not same as one sued on, not provable debt, not properly scheduled, or that notice not properly given creditor. *Id.*
In suit under § 16 of Commerce Act, report of Commission finding rate complained of unreasonable and awarding specified amount for reparation, is *prima facie* evidence of damages sustained, although evidential or primary facts not set forth. *Mills* v. *Lehigh Valley R. R.* 473

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Guardian cannot, through award of Land Commission, obtain title to property of ward which would be so immune from subsequent attack that the wrong would be without redress. *Kapiolani Estate* v. *Atcherley*..... 119

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Under laws of Creek Indians, husband, whether citizen or not, took half interest in wife's property if she died without children. *Woodward* v. *DeGraffenried*..... 284

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Provisions of law of 1907, prohibiting sale of food preservatives containing boric acid, not unconstitutional under Fourteenth Amendment, or as to sales within State of ar-

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tickles involved in action in packages in which sold, under commerce clause. *Price* v. *Illinois*. 446
Revised Stat. 1913, c. 114, § 84, requiring railroad to furnish cars within reasonable time after demand, not void as burden on interstate commerce. *Illinois Cent. R. R.* v. *Mulberry Coal Co*. 275

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Restriction upon alienation in Original Creek Agreement not applicable to allotments made on behalf of deceased members of tribe. *Woodward* v. *De Graffenried* 284
Under laws of Creek Indians, husband, whether citizen or not, took half interest in wife's property if she died without children. *Id.*
Equitable title to allotment made under Curtis Act to Creek female citizen who dies before ratification of Original Creek Agreement vested in her heirs under § 28 of the agreement; and, if not within excepted classes, was confirmed by § 6 to her heirs to be determined by Creek laws of descent. *Id.*
Under Original Creek Agreement interest of allottees under Curtis Act who had died before ratification of agreement descended according to Creek laws and not according to those of Arkansas. *Id.*
Under Original Creek Agreement, allotments made prior thereto under Curtis Act, if not inconsistent therewith, were to be treated as if made after ratification thereof, including designation of beneficiaries in case of death. *Id.*
Under § 11 of Curtis Act, allottees took no assignable or inheritable interest or anything more than an exclusive right to possess and enjoy the surface of the land for life. *Id.*
The only lawful authority possessed by Dawes Commission to allot Creek lands prior to adoption of Original Creek Agreement was derived from Curtis Act. *Id.*

INITIALS. See **Names.**

INJUNCTION:
That irreparable injury might result from orders of Interstate Commerce Commission, unless interlocutory injunction might be granted restraining their enforcement, influenced Congress to provide for direct appeal here from order granting or denying such injunction. *Louisville & Nashville R. R.* v. *United States* 1
As general rule appellate court will not interfere with deci-

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sion of chancellor refusing interlocutory injunction unless abuse of discretion clearly appears; but where order sought to be enjoined operates to reduce revenue chancellor's discretion should be influenced by fact that decree may be equivalent of final one. *Id.*
Enjoining railroad from violation of conditions contained in land grant. See *Oregon & Cal. R. R.* v. *United States* 393

INSTRUCTIONS TO JURY:
Right to instruction that one entitled to damages for property taken. See *Brand* v. *Union Elevated R. R.*. 586

INSURANCE COMPANIES:
State may tax life insurance companies upon business done within State and measure tax upon premiums on policies of residents thereof. *Equitable Life Society* v. *Pennsylvania* .. 143
In estimating amount of premiums paid by residents of State as basis for taxation of insurance companies by State, those paid to foreign companies outside of State may be included without depriving such companies of their property without due process of law. *Id.*
Pennsylvania act of 1895, levying tax on gross premiums of life insurance companies received for business done within State, does not amount to taking property beyond its jurisdiction as to premiums paid directly to a corporation outside of State. *Id.*

INTEREST:
It is not in derogation of its sovereignty that State be charged with interest if agreement so provides. *Virginia* v. *West Virginia* 202
In a contract between sovereign States questions of whether debtor party liable for interest on ascertainment of amount due, rate of interest and period from which to be computed, determined by fair intendment of contract itself. *Id.*
Contract on part of State to assume equitable proportion of interest-bearing debt means taking over of liability for both interest and principal. *Id.*
Allowance in accounting between States. See *Id.*

INTERSTATE COMMERCE:
1. *What constitutes:* Essential character determines whether interstate or intrastate, and not mere billing at place where title passes. *Pennsylvania R. R.* v. *Clark Coal Co.* 456
Whether railroad employé is engaged in interstate com-

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merce must be decided in light of particular facts of each case. *New York Cent. & H. R. R. Co.* v. *Carr* 260

Brakeman on intrastate car in train consisting of both intrastate and interstate cars, engaged in cutting out former so that train may proceed on its interstate business, is, while so doing, engaged in interstate commerce and may maintain action under Employers' Liability Act. *Id.*

Transportation of liquor from State to State is interstate commerce and beyond interference by State. *Rossi* v. *Pennsylvania*. 62

Where, for purpose of filling contracts with purchasers in other States, coal is delivered f. o. b. at mine, for transportation to such purchasers, movement and facilities required are those of interstate commerce. *Pennsylvania R. R.* v. *Clark Coal Co*. 456

On failure of record to show that any of shipments involved in case, in which state court gave judgment against carrier for damages for discrimination under state law, were interstate shipments, court having found them intrastate, judgment affirmed. *Pennsylvania R. R.* v. *Mitchell Coal Co*. 251

2. *Scope of Commerce Act:* Commerce Act governs shippers no less than carrier. *Pennsylvania R. R.* v. *Clark Coal Co*. . . 456

Rules as to car distribution are within provision of § 3 of Commerce Act. *Id.*

While act of 1906 gave new rights to shippers it preserved existing rights and did not supersede jurisdiction of state courts in any case where decision did not involve determination of matters calling for exercise of administrative power and discretion of Commission or relate to subjects within exclusive jurisdiction of Federal courts. *Illinois Cent. R. R.* v. *Mulberry Coal Co*. 275

3. *Power of Congress over:* Order requiring carrier to extend to connecting carriers, as to competitive business, same switching facilities as it extends to some of other connecting carriers, in regard to same class of business, not violative of due process under Fifth Amendment, nor violative of § 15 of Commerce Act. *Louisville & Nashville R. R.* v. *United States* 1

4. *Power of States over:* State may not, in case arising prior to Webb-Kenyon Law, punish one who sells and delivers liquor in original packages within State pursuant to orders solicited within State but delivered from without. *Rossi* v. *Pennsylvania*. 62

Wilson Act does not subject liquor transported in interstate

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commerce to state regulation until after arrival at destination and delivery to consignee or purchaser, even though transmitted in pursuance of order previously obtained within State where there is no statute prohibiting solicitation and taking of such orders without a license. *Id.*
Effect of Webb-Kenyon Act to change general rule that State may not regulate commerce wholly interstate. *Adams Express Co.* v. *Kentucky* 190
5. *Burdens on and interference with:* State statute merely requiring railroad to furnish cars within reasonable time after demand not such direct burden as to be void in absence of legislation on subject by Congress. *Illinois Cent. R. R.* v. *Mulberry Coal Co.* 275
6. *Preferences and discriminations:* Common measure of value, applicable to some extent to freight charges, is comparison with amounts charged for same article by different persons. *Louisville & Nashville R. R.* v. *United States.* . . . 1
In attacking existing freight rate burden is on complainant to show unreasonableness in fact. *Id.*
7. *Reparation:* Where it appears that Commerce Act violated and requisite ruling as to unreasonableness of practice assailed made by Commission, § 9 applies and is exclusive, and shipper must elect between proceeding for reparation award before Commission or suit in Federal court; he cannot resort to state court. *Pennsylvania R. R.* v. *Clark Coal Co.* 456
After proceeding before and reparation by Interstate Commerce Commission, suit may be brought under § 16 of Commerce Act in either state or Federal court. *Id.*
Where shipper secures from Interstate Commerce Commission award for discrimination in car distribution, his claim for damages can be prosecuted only under Commerce Act, even though action in state court brought before Commission has made the award. *Id.*
Commerce Act does not allow any attorney's fee for reparation proceeding before Commission, but only for action in court based on reparation award. *Mills* v. *Lehigh Valley R. R.* 473
In suit under § 16 of Commerce Act, report of Commission finding rate complained of unreasonable and awarding specified amount for reparation, is *prima facie* evidence of damages sustained, although evidential or primary facts not set forth. *Id.*
8. *Tariffs:* Mere distance not necessarily determining factor

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in fixing freight rates; competition largely entering therein. *Louisville & Nashville R. R.* v. *United States* 1

Finding of one of many rates to be higher than all others may raise presumption that single rate high; and if some of lower rates prescribed by Interstate Commerce Commission there is a *prima facie* standard for testing reasonableness of rate under investigation. *Id.*

Where Interstate Commerce Commission has fixed amount of rate in light of findings made on consideration of much and varied evidence, and such rate not claimed confiscatory, held that findings support order fixing rates. *Id.*

9. *Commodities Clause:* Commodities Clause of Hepburn Act made it unlawful for carriers to transport in interstate commerce any coal in which carrier had interest, direct or indirect. *United States* v. *Delaware, L. & W. R. R.* 516

Carrier engaged in mining coal may institute organization of coal company to buy or produce the coal so as to comply with terms of Commodities Clause, and give its stockholders opportunity to subscribe to the stock, but must dissociate itself from management of coal company as soon as same starts business. *Id.*

Mere stock ownership by railroad or its stockholders in producing company not test of illegality under Commodities Clause, but unity of management and *bona fides* of contract between carrier and producer. *Id.*

Commodities Clause and Anti-trust Act not concerned with interest of the parties, but with that of public; and if contract between carrier and producer is, as matter of law, in restraint of trade, or if producer is practically agent of carrier, transportation by carrier of article produced is unlawful. *Id.*

Under Commodities Clause carrier engaged in mining coal must absolutely dissociate itself from the coal before transportation begins; and if it sells at mouth of mine buyer must be absolutely free to dispose of it and have absolute control, nor should it sell to corporation managed by same officers as itself. *Id.*

Contract between carrier mining coal and buying company taking all of product, to be not illegal must leave buyer free to extend its business elsewhere as it pleases and to otherwise act in competition with carrier. *Id.*

Contract which enables railroad company to practically con-

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trol output, sales and price of coal and to dictate to whom to be sold, is illegal. *Id.*
10. *Original Package Doctrine:* Where character of shipment not shown, packages cannot be classed with the "original packages" within rule of protection against police laws of State. *Price* v. *Illinois*. 446

INTERSTATE COMMERCE COMMISSION:
Where Commission makes award to shipper complaining of unreasonable and discriminatory rates, as reparation, it expresses such decision as matter of ultimate fact, and form of expression is not confined to particular formula. *Mills* v. *Lehigh Valley R. R.* 473
Where complaint involves attack on method of car distribution for interstate shipments, action for damages not maintainable until reasonableness of method passed upon by Commission. *Pennsylvania R. R.* v. *Clark Coal Co.* 456
Under such conditions Commission has authority to examine into and report upon amount of damages sustained by shipper by reason of discrimination. *Id.*
Whether method of car distribution for mines furnishing coal f. o. b. at mine for shipment to other States is unjustly discriminatory, is question for Commission to pass upon. *Id.*
That irreparable injury might result from orders of Commission, unless interlocutory injunction might be granted restraining their enforcement, influenced Congress to provide for direct appeal here from order granting or denying such injunction. *Louisville & Nashville R. R.* v. *United States*. 1

INTOXICATING LIQUORS:
Except as affected by the Wilson and Webb-Kenyon acts, interstate transportation of liquor is left untouched and remains within sole jurisdiction of Congress. *Adams Express Co.* v. *Kentucky* 190
Webb-Kenyon Law does not prohibit all interstate shipment or transportation of liquor into dry territory, but its prohibitions are operative whenever, and only when, the liquor is to be dealt with in violation of law of State into which shipped. *Id.*
State may not, in case arising prior to Webb-Kenyon Law, punish one who sells and delivers liquor in original packages

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within State pursuant to orders solicited within State but delivered from without. *Rossi* v. *Pennsylvania*. 62

Transportation of liquor from State to State is interstate commerce and beyond interference by State. *Id.*

Wilson Act does not subject liquor transported in interstate commerce to state regulation until after arrival at destination and delivery to consignee or purchaser, even though transmitted in pursuance of order previously obtained within State where there is no statute prohibiting solicitation and taking of such orders without a license. *Id.*

JOINDER OF CAUSES. See **Actions.**

JUDGMENTS AND DECREES:

Refusal of court, in action by owner of goods against carrier, to admit judgment obtained against carrier under which goods taken, on common law ground that notice of suit was not given to owner, does not amount to denial of full faith and credit. *Wells Fargo & Co.* v. *Ford* 503

When judgment provable debt in bankruptcy. See *Kreitlein* v. *Ferger* 21

See **Res Judicata.**

JUDICIAL CODE:

Provisions construed:

Section 24. *Geneva Furniture Mfg. Co.* v. *Karpen* 254

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Section 51. *Geneva Furniture Mfg. Co.* v. *Karpen* 254

Section 237. *Central Vermont Ry.* v. *White*. 507

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Section 241. *United States* v. *Cooke*. 613

Section 250. *Newman* v. *Frizzell* 537

United Surety Co. v. *American Fruit Co*. 140

Section 256. *Geneva Furniture Mfg. Co.* v. *Karpen* 254

JUDICIAL DISCRETION:

As general rule appellate court will not interfere with decision of chancellor refusing interlocutory injunction unless abuse of discretion clearly appears; but where order sought to be enjoined operates to reduce revenue chancellor's discretion should be influenced by fact that decree may be

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equivalent of final one. *Louisville & Nashville R. R.* v. *United States*. 1

JUDICIARY. See **Courts; Jurisdiction.**

JURISDICTION:
I. **Generally.**
Jurisdiction is power to consider and decide as law may require; it is not to be declined because it is not foreseen with certainty that party invoking it may succeed. *Geneva Furniture Mfg. Co.* v. *Karpen* 254
II. **Jurisdiction of this court.**
1. *Over judgments of Circuit Court of Appeals:* To review judgment of Circuit Court of Appeals jurisdiction of District Court must have been rested not alone on diversity of citizenship, but also on substantial controversy under Constitution or laws of United States. *Delaware, L. & W. R. R.* v. *Yurkonis* 439
2. *Over judgments of Court of Appeals of District of Columbia:* Jurisdiction under § 250 (6), Jud. Code, confined to construction of laws of general application throughout United States and does not include local laws. *United Surety Co.* v. *American Fruit Co.*. 140
Quære, whether under § 250 (3) jurisdiction does not exist where constitutionality of statute of United States, whether general or local, is involved. *Id.*
Sections 1538–1540 of District Code, relative to *quo warranto,* are general and not local laws, and in case involving their construction this court has jurisdiction under § 250, Jud. Code. *Newman* v. *Frizzell*. 537
3. *Over judgments of state courts:* Questions of general law relative to admission of evidence, not involving construction of Federal statute, not reviewable under § 237, Jud. Code. *Central Vermont Ry.* v. *White* 507
If it appears from opinion of trial court that constitutional question treated as sufficiently raised and specifically dealt with adversely to plaintiff in error, jurisdiction under § 237, Jud. Code, exists. *Mallinckrodt Works* v. *St. Louis*. 41
When question is whether particular law of Arkansas was or was not put into effect in Indian Territory by act of Congress, jurisdiction exists under § 237, Jud. Code, to review judgment of state court of Oklahoma. *Perryman* v. *Woodward* 148
See **Appeal and Error.**

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III. **Of Circuit Court of Appeals.**

In absence of averments in complaint showing cause of action under Constitution or laws of United States, judgment final. *Delaware, L. & W. R. R.* v. *Yurkonis*. 439

IV. **Of District Court.**

Rule that in absence of diversity of citizenship jurisdiction depends upon whether Federal cause of action stated in bill, applies to suits against national banks and their directors. *Herrmann* v. *Edwards*. 107

In absence of diverse citizenship, there is no jurisdiction of suit by stockholder against directors of national bank to compel reimbursement to bank for wrongfully investing its funds. *Id.*

No presumption of intent of Congress to make radical change in rule prevailing for many years relative to jurisdiction of suits against national banks. *Id.*

Intent of Congress to confer jurisdiction on Federal courts of all suits by and against national banks not presumed. *Id.*

Where corporation operates railroads, has its general office and keeps one of its bank accounts outside of State, but has an office in Federal District of State, where its president and treasurer reside, and in which it keeps bank accounts, held, that service of process within such District, upon its president, sufficient to give District Court jurisdiction. *Washington-Virginia Ry.* v. *Real Estate Trust Co.*. 185

Where plaintiff really makes substantial claim under act of Congress jurisdiction exists, whether claim ultimately be held good or bad. *Geneva Furniture Mfg. Co.* v. *Karpen* 254

Where bill includes several causes of action, some arising under patent laws and others on breach of contractual relations, and one of defendants a corporation not suable in district without its consent, save in cases arising under the patent laws, rule as to joinder yields to jurisdictional statute, and on objection to jurisdiction bill dismissed as to corporation in respect of causes not arising under patent laws. *Id.*

Whether all the causes may be maintained in a single bill as against other defendants is question of general equity jurisdiction and practice not open to consideration on direct appeal under § 238, Jud. Code. *Id.*

V. **Of Interstate Commerce Commission.** See **Interstate Commerce Commission.**

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VI. **Of State Courts.**

State courts have jurisdiction of case for damages against carrier for failure to deliver cars in accordance with its own rules for distribution, where rule itself not attacked, but discrimination basis of suit. *Illinois Cent. R. R.* v. *Mulberry Coal Co.* 275

Amendment of 1906 to Interstate Commerce Act did not supersede jurisdiction of state courts in any case where decision did not involve determination of matters calling for exercise of administrative power and discretion of Commission or relate to subjects within exclusive jurisdiction of Federal courts. *Id.*

JURY AND JURORS:

Jurors should not reach verdict by lot or by averaging amounts suggested by each; but verdict may not be set aside on testimony of juror. *McDonald* v. *Pless* 264

Testimony of jurors may not be received to prove misconduct of himself or colleagues in reaching verdict. *Id.*

Under Employers' Liability Act jury not required to apportion damages in case of death of employé. *Central Vermont Ry.* v. *White* 507

Kansas City Southern Ry. v. *Leslie* 599

LACHES:

Delay in assertion of right not conclusive against its existence. *Oregon & Cal. R. R.* v. *United States* 393

See **Limitations.**

LAND GRANTS. See **Construction; Public Lands.**

LAW AND FACTS:

Facts established must be adequate as a matter of law to support finding of requisite public necessity in justifying order of state commission to require railroad to expend money—mere declaration of commission not conclusive. *Great Northern Ry.* v. *Minnesota* 340

LAW GOVERNING:

While matters of procedure depend upon law of place where suit brought, matters of substance regarding action based on Federal statute depend on statute. *Central Vermont Ry.* v. *White* 507

Whether provision in suffrage statute may be valid under Federal Constitution, if it is so connected with other provi-

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sions that are invalid, as to make entire statute unconstitutional, is question of state law. *Guinn* v. *United States* 347

Effect of riparian rights, attached to land conveyed by patent of United States, depends upon local law. *Producers Oil Co.* v. *Hanzen*. 325

In 1900, under § 31, Oklahoma Government Act of 1890, § 3, c. 1, Mansfield's Digest of Arkansas, was in force in Oklahoma. *Perryman* v. *Woodward*. 148

Under Original Creek Agreement interest of allottees under Curtis Act who had died before ratification of agreement descended according to Creek laws and not according to those of Arkansas. *Woodward* v. *De Graffenried* 284

Where shipper secures from Interstate Commerce Commission award for discrimination in car distribution, his claim for damages can be prosecuted only under Commerce Act, even though action in state court brought before Commission has made the award. *Pennsylvania R. R.* v. *Clark Coal Co*. 456

LEGISLATION:

In enacting police statute legislature not limited to general directions, but may prohibit sale of such specific articles as it deems injurious. *Price* v. *Illinois* 446

No person has vested right in any general rule of law or policy of legislation giving him immunity from change, and such immunity is not to be implied as unexpressed term of express contract. *Chicago & Alton R. R.* v. *Tranbarger* 67

See **Construction; States.**

LIMITATIONS:

One year period of limitation prescribed in § 29a of Bankruptcy Act not applicable to conspiracy having for its object commission of offense denounced by that act. *United States* v. *Rabinowich* 78

Time limit in state statute requiring railroads to provide outlets for water across rights of way should be construed as limited to railroads erected after passage of act, and that, as to those already constructed, reasonable time should be allowed. *Chicago & Alton R. R.* v. *Tranbarger*. 67

See **Laches.**

LIQUOR. See **Intoxicating Liquors.**

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LOCAL LAW. See **Law Governing and captions of various States, Territories and Insular Possessions.** PAGE

MARYLAND:
Grandfather Clause in statute of 1908 invalid under Fifteenth Amendment. *Myers* v. *Anderson*. 368

MASTER AND SERVANT:
Although shipper may be in control of car and may be negligent in regard thereto, carrier not relieved of responsibility to employé for injuries received. *Texas & Pacific Ry.* v. *Murphy* 320
See **Employers' Liability Act; Safety Appliance Act.**

MEANDERS. See **Boundaries.**

MINNESOTA:
Order of Railroad Commission requiring railroad to install weighing scales at a station, similar to those installed at some of its stations, in order to abate discrimination, held arbitrary and unreasonable. *Great Northern Ry.* v. *Minnesota* 340

MISSOURI:
Section 10322, Mo. Rev. Stat. 1909, requiring officers of corporations to file affidavit as to non-participation of corporation in pool, trust, etc., under penalty of forfeiture of charter or right to do business in State, not unconstitutional as depriving corporation of its property without due process of law or as denying equal protection of the law. *Mallinckrodt Works* v. *St. Louis*. 41
Amendment of statute requiring railroads to maintain ditches along right of way so as to require outlets for water and imposing liability and penalties for non-compliance within three months after completion, held, in action for damages, not an *ex post facto* law where embankment causing damage had been erected more than three months prior to amendment. *Chicago & Alton R. R.* v. *Tranbarger*. 67

MUNICIPAL CORPORATIONS:
In absence of impairment of contract obligation, exercise by municipality of lawful power to fix rates does not deprive public utility of property without due process of law where it does not appear that rates are confiscatory. *Milwaukee Electric Ry.* v. *Wisconsin R. R. Comm.*. 174

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In listing creditors in schedule under Bankruptcy Law, use of initials instead of full Christian name not fatal. *Kreitlein* v. *Ferger* 21

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NEGLIGENCE:

Principle that burden of proving contributory negligence on defendant enforced by Federal courts, even in States which hold that burden is on plaintiff to disprove. *Central Vermont Ry.* v. *White* 507

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NEW TRIAL:

Granting partial new trial in actions under Employers' Liability Act not commended. *Norfolk & Southern Ry.* v. *Ferebee* 269

NOTICE:

Carrier, having custody of goods, bound to give consignor notice of suit in which right of possession involved. *Wells Fargo & Co.* v. *Ford* 503

Effect of want of notice in bankruptcy proceeding. See *Kreitlein* v. *Ferger* 21

OFFENSES:

Presumption of intent of Congress to maintain distinction between. See *United States* v. *Rabinowich* 78

What within meaning of § 29a of Bankruptcy Act. See *Id.*

Quære as to who may commit crime defined in § 29b (1) of Bankruptcy Act. *Id.*

OFFICE:

In early days usurpation of office a crime and prosecuted as such; later *quo warranto* used to determine title as between two claimants. *Newman* v. *Frizzell* 537

Congress has not authorized, but has placed obstacles in the way of, private citizen on own motion to attack an incumbent's title to office. *Id.*

OKLAHOMA: PAGE

Suffrage and literacy tests in amendment of 1910 to constitution of Oklahoma so connected that unconstitutionality of former renders whole amendment invalid. *Guinn* v. *United States*. 347

Amendment to constitution of 1910 is invalid as a whole. *Id.*

Grandfather Clause of Oklahoma constitution violative of Fifteenth Amendment. *Id.*

In 1900, under § 31, Oklahoma Government Act of 1890, § 3, c. 1, Mansfield's Digest of Arkansas, was in force in Oklahoma. *Perryman* v. *Woodward*. 148

Under the law in force in Oklahoma in 1900, where decedent's estate was less than $300 it vested absolutely in the widow, and where probate court had so decided grantee of widow took good title, whether order of such court was made before or after purchase of property in question. *Id.*

ORIGINAL PACKAGES:

Where character of shipment not shown, packages cannot be classed with the "original packages" within rule of protection against police laws of State. *Price* v. *Illinois*. 446

PARTIES:

One seeking to set aside state statute as unconstitutional must show that he is in class affected. *Mallinckrodt Works* v. *St. Louis*. 41

Where duty imposed for protection of persons in particular situations or relations, a breach of which results in injury to one in an altogether different situation or relation, is not, as to him, actionable. *St. Louis & S. F. R. R.* v. *Conarty*. . . 243

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PENALTIES AND FORFEITURES:

Court of equity reluctant to lend aid to enforce forfeiture. *Oregon & Cal. R. R.* v. *United States*. 393

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PENNSYLVANIA:

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Error of trial court in misconstruing general order giving one accused of crime a specified time within which to plead, held not to vitiate proceedings and enlarge accused. *McMicking* v. *Schields*. 99

PLEADING:

In action under Employers' Liability Act, ruling of state court as to effect of amendments and replications are matters of state pleading and practice and are binding on this court. *Central Vermont Ry.* v. *White*. 507

Where carrier failed to give reasonable notice to owner of suit in which goods seized, it cannot, in suit by owner against it, plead the judgment against it under which goods taken. *Wells Fargo & Co.* v. *Ford*. 503

POLICE POWER:

Embraces regulations designed to promote public convenience or general welfare, as well as those in interest of public health, morals or safety. *Chicago & Alton R. R.* v. *Tranbarger* 67

Extends to imposing restrictions having reasonable relation to preservation of health; and nature and extent of such restrictions are matters for legislative judgment in defining policy of State. *Price* v. *Illinois*. 446

Requiring railroads to provide means for water passing under embankments is legitimate exercise of power. *Chicago & Alton R. R.* v. *Tranbarger* 67

Legislation regarding prompt furnishing of cars, loading of same by shipper and prescribing damages and penalties for failure on part of either, is within power of State. *Atchison, T. & S. F. Ry.* v. *Vosburg*. 56

Power inalienable even by express grant and all contract and property rights are held subject to its fair exercise. *Chicago & Alton R. R.* v. *Tranbarger* 67

In enacting police statute legislature not limited to general directions, but may prohibit sale of such specific articles as it deems injurious. *Price* v. *Illinois* 446

State statute that does not purport to be a health measure cannot be sustained as such. *Chicago, M. & St. P. R. R.* v. *Wisconsin*. 491

Police statute not unconstitutional under due process clause because innocuousness of prohibited article is debatable. *Price* v. *Illinois*. 446

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Police regulation subject to equal protection clause of Constitution. *Atchison, T. & S. F. Ry.* v. *Vosburg*. 56

Wisconsin statute imposing penalties on sleeping car companies if, lower berth being occupied, upper let down before actually engaged, not justified as health measure. *Chicago, M. & St. P. R. R.* v. *Wisconsin* 491

POLICE REGULATIONS:

Enforcement of uncompensated obedience to legitimate regulation not repugnant to Fourteenth Amendment. *Chicago & Alton R. R.* v. *Tranbarger* 67

This court need not determine what is reasonable time for compliance with regulation, when question raised by one refusing compliance on ground that legislature had no power to enact statute. *Id.*

PRACTICE AND PROCEDURE:

Scope of decision: Questions of general law relative to admission of evidence, not involving construction of Federal statute, not reviewable under § 237, Jud. Code. *Central Vermont Ry.* v. *White* 507

On writ of error to state court in action under Federal Employers' Liability Act, only assignments relating to matters of practice, pleading and evidence involving construction of that statute, considered. *Id.*

Determination of whether application of state statute as construed by state courts is so arbitrary as to amount to deprivation of property without due process of law, is open in this court. *Southwestern Tel. Co.* v. *Danaher* 482

Where this court cannot review judgment of Circuit Court of Appeals because jurisdiction of Federal court rests on diverse citizenship alone, it cannot pass on question of whether plaintiff had not, prior to commencement of action, become citizen of defendant's State. *Delaware, L. & W. R. R.* v. *Yurkonis* 439

Whether provision in suffrage statute may be valid under Federal Constitution, if it is so connected with other provisions that are invalid as to make the whole statute unconstitutional may, in absence of decision by state court, be determined by this court in case coming from Federal courts. *Guinn* v. *United States* 347

Question of constitutionality of state statute, not raised in

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either of state courts, not considered here. *Illinois Cent. R. R.* v. *Mulberry Coal Co.*.... 275
Constitutional question without real foundation cannot be put forward as a mere pretext to open other questions not otherwise open. *United Surety Co.* v. *American Fruit Co.*.. 140
Court will not pass upon definition of disputed terms in state statute where that point of no consequence to plaintiff in error. *Mallinckrodt Works* v. *St. Louis*..... 41
This court need not determine what is reasonable time for compliance with police regulation, when question raised by one refusing compliance on ground that legislature had no power to enact statute. *Chicago & Alton R. R.* v. *Tranbarger* 67
Disposition of case: In suit to enjoin putting of rate making ordinance into effect, held, that bill should have been dismissed without prejudice to right of complainant to reinstate case after reasonable test. *Des Moines Gas Co.* v. *Des Moines*..... 153
Where in case involving guardianship relations, the suggestion of which had no substantial foundation on the record, this court followed decision of local court; and subsequently the relationship having been cleared up and shown by the record to exist, lower court should have given full effect to that fact and not have followed the decision of this court. *Kapiolani Estate* v. *Atcherley*..... 119
Following state court: Court accepts state court's construction of pure food statute and whether specified articles within, and then determines validity under Federal Constitution. *Price* v. *Illinois*..... 446
Where this court cannot say that statute involved unequivocally granted to municipalities power to deprive legislature of right to exercise rate-making function in the future, and state court in other cases has held that statute does not indicate intention to surrender such right, judgment of state court holding that no irrevocable contract was created by ordinance establishing rates, affirmed, notwithstanding majority of members of highest state court did not concur in that view. *Milwaukee Electric Ry.* v. *Wisconsin R. R. Comm.*..... 174
In determining for itself whether there was a contract and the extent of a binding obligation this court gives much consideration to decisions of the state court construing statutes under which contract alleged to have been created. *Id.*
In action under Employers' Liability Act, ruling of state

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court as to effect of amendments and replications are matters of state pleading and practice and are binding on this court. *Central Vermont Ry.* v. *White* 507
In general: Filing of large number of assignments of error disapproved. *Central Vermont Ry.* v. *White* 507
Equity rules 75–77 call for presentation of only relevant evidence and exhibits; elimination of reduplication; and condensation into narrative form. *Louisville & Nashville R. R.* v. *United States*..... 1
Granting partial new trial in actions under Employers' Liability Act not commended. *Norfolk & Southern Ry.* v. *Ferebee*..... 269
Where verdict in action under Employers' Liability Act increased by inclusion as beneficiaries of parties not entitled, defendant may raise question in manner appropriate under practice of trial court. *Central Vermont Ry.* v. *White*..... 507
While matters of procedure depend upon law of place where suit brought, matters of substance regarding action based on Federal statute depend on statute. *Id.*
Where, on direct appeal under act of Oct. 22, 1913, appellants able to concede that there was evidence which, although conflicting, tended to support findings of Interstate Commerce Commission, omission from record of testimony and insistence that findings insufficient to support orders of Commission, is commendable. *Louisville & Nashville R. R.* v. *United States*..... 1
In advance of construction of statute by courts of enacting State, assumption that such courts will so construe as to render act constitutional. *Mallinckrodt Works* v. *St. Louis*.. 41

PREFERENCES. See **Bankruptcy; Interstate Commerce.**

PRESUMPTIONS:
Public authority presumed to have acted fairly. *Des Moines Gas Co.* v. *Des Moines* 153
Presumption that going concern value of public utility considered in determining valuation for rate making purposes. *Id.*
Court will not assume that goods are shipped from State to State in small retail packages. *Price* v. *Illinois*..... 446
No presumption of intent of Congress to make radical change in rule prevailing for many years relative to jurisdiction of suits against national banks. *Herrmann* v. *Edwards*..... 107

PRINCIPAL AND AGENT. See **Interstate Commerce.** PAGE

PRINCIPAL AND SURETY:

Statute providing that surety, by executing undertaking to release property attached, is bound by judgment against principal, not unconstitutional as denial of due process of law. *United Surety Co.* v. *American Fruit Co.* 140

PROCESS:

Whether corporation doing business within a district so as to have submitted itself to jurisdiction depends in each case upon the facts proved. *Washington-Virginia Ry.* v. *Real Estate Trust Co.* 185

Where corporation operates railroads, has its general office and keeps one of its bank accounts outside of State, but has an office in Federal District of State, where its president and treasurer reside, and in which it keeps bank accounts, held, that service of process within such District, upon its president, sufficient to give District Court jurisdiction. *Id.*

Liability of carrier for goods taken under legal process. See *Wells Fargo & Co.* v. *Ford.* 503

See **Habeas Corpus; Injunction; Jurisdiction; Quo Warranto.**

PROPERTY RIGHTS:

Held subject to fair exercise of police power. *Chicago & Alton R. R.* v. *Tranbarger* 67

Owner's right to his property is protected even though he may not be actually using it. *Chicago, M. & St. P. R. R.* v. *Wisconsin* 491

State statute, not a reasonable exercise of police power, but which operates to take property, not justified on ground that party whose property taken may be able to get increase in rates obtained for property not taken. The taking and fixed right to compensation must coincide. *Id.*

Order of state railroad commission requiring railroad to install and maintain scales amounts to a taking of company's property. *Great Northern Ry.* v. *Minnesota* 340

Requiring railroads to provide means for water passing under embankments not taking of property without compensation but application of maxim *sic utere tuo ut alienum non lædas.* *Chicago & Alton R. R.* v. *Tranbarger* 67

Nothing in the Federal Constitution gives any one right to have the jury instructed that he is entitled to damages for property taken, where the instruction is not based on some

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evidence or entitles him to damages without proof. *Brand* v. *Union Elevated R. R.* 586

After elevated railroad had been built in a street, the jury, in suit brought by abutting owner, viewed the premises, and the only testimony showed that the property was worth more after, than before, erection of structure; *held*, that owner was not entitled to an instruction that jury must exclude from their estimate of market value subsequent to the construction any enhancement from the facilities furnished to the property by the structure itself, in absence of any direct evidence as to whether any such enhancement exists. *Id.*

By simply viewing property after the erection of an elevated structure in front of it, a jury cannot, in the absence of any evidence other than that the property is worth more than before the structure was built, ascertain what the market value was either before or just after the erection of the structure. *Id.*

Wisconsin statute imposing penalties on sleeping car companies if, lower berth being occupied, upper let down before actually engaged, is unconstitutional under due process of law clause of Fourteenth Amendment as arbitrary taking of property without compensation. *Chicago, M. & St. P. R. R.* v. *Wisconsin* 491

See **Constitutional Law.**

PROVABLE DEBTS. See **Bankruptcy.**

PUBLIC HEALTH:

Police power of State extends to imposing restrictions having reasonable relation to preservation of health; and nature and extent of such restrictions are matters for legislative judgment in defining policy of State. *Price* v. *Illinois* 446

PUBLIC LANDS:

As general rule, meanders not treated as boundaries, and when United States conveys tract of land by patent referring to an official survey showing same bordering on navigable river, purchaser takes title up to water line. *Producers Oil Co.* v. *Hanzen* 325

Where facts and circumstances affirmatively disclose intention to limit grant to actual traverse lines, these treated as definite boundaries; and patent to fractional section does

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not necessarily confer riparian rights because of presence of meanders. *Id.*

Where survey of improved lands was made at express request of occupant to whom subsequently patented, and grant specified the number of acres, and other circumstances also indicated that only the lands conveyed were those within the traverse lines, the patent conferred no riparian rights but simply conveyed the specified number of acres. *Id.*

In controversy between individuals as to extent of land conveyed by patent and to which United States not a party, nothing in opinion or judgment should be taken to prejudice any of the rights of the United States in the lands affected. *Id.*

That actions of railroads in connection with lands granted were known to government officials and that no action was taken in regard thereto does not amount to estoppel preventing Government from enforcing covenants contained in grants. *Oregon & Cal. R. R.* v. *United States*..... 393

Words " actual settlers " indicate no particular individuals; and uncertainty of expression in acts involved prevents any individual from being a *cestui que trust* to enforce condition of statute. *Id.*

There can be given to land grant statutes no greater sanction than Congress intended, nor can there be given to parties rights which statutes did not confer upon them. *Id.*

Effect of § 32, act of 1910, relative to deeds to tribal lands issued after death of party entitled, was to make patented lands part of estate of nominal party as though deed had issued during his life; and where title previously given by decree of probate court having jurisdiction it simply established validity of title. *Perryman* v. *Woodward*..... 148

Provisos in Land Grant Act of 1866, as amended in 1868 and 1869, and in act of 1870, relative to sale of land granted, are not conditions subsequent, violation of which results in forfeiture of grants, but are enforceable covenants. *Oregon & Cal. R. R.* v. *United States*..... 393

Under such acts there was a complete grant to the railroad with power to sell limited only as prescribed; and those setting up alleged rights in the land by reason of settlement thereon cannot sustain their claim thereto. There can be no absolute right to purchase and settle on lands where there is no compulsion to sell. *Id.*

PUBLIC LANDS—*Continued.* PAGE
Acts of Congress granting lands are laws and operative until repealed. *Id.*
That conditions imposed in grants not applicable to character of lands furnishes no excuse for antagonistic action, even though justifying non-action pending further legislation. *Id.*
Enjoining railroad from violation of conditions contained in land grant. *Id.*

PUBLIC OFFICERS:
Public authority presumed to have acted fairly. *Des Moines Gas Co.* v. *Des Moines* 153
Congress has not authorized, but has placed obstacles in the way of, private citizen on own motion to attack an incumbent's title to office. *Newman* v. *Frizzell* 537
Effect of knowledge to estop Government. See *Oregon & Cal. R. R.* v. *United States*..... 393

PUBLIC SERVICE CORPORATIONS. See **Public Utilities.**

PUBLIC UTILITIES:
Fixing of rates to be charged by public service corporations is legislative function of State. *Milwaukee Electric Ry.* v. *Wisconsin R. R. Comm.*. 174
In absence of impairment of contract obligation, exercise by municipality of lawful power to fix rates does not deprive public utility of property without due process of law where it does not appear that rates are confiscatory. *Id.*
Rates of public service corporations are fixed in expectation that they will be paid, and reasonable regulations tending toward prompt payment are necessary. *Southwestern Tel. Co.* v. *Danaher*..... 482
Regulations requiring payment of rates of public service corporations in advance are not unreasonable, and a telephone company is not subject to penalties for refusing to render service to a subscriber who is delinquent on past rates and refuses to pay in advance in accordance with established rule uniformly enforced, nor because it charges full price to subscriber who does not pay in advance while allowing stated discount to those who do. To enforce against such company penalty for refusing to furnish service under such conditions amounts to deprivation of property without due process. *Id.*
Good will, in its general sense, not considered in fixing value

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tion for purpose of rate making of public utility. *Des Moines Gas Co.* v. *Des Moines* 153
Going concern value an element in determining valuation on which owner of property dedicated to public use entitled to fair return; and in its determination each case controlled by its own circumstances. *Id.*
Presumption that going concern value of public utility considered in determining valuation for rate making purposes. *Id.*
Burden of proof is on public utility corporation to show regulating ordinance has effect to deprive it of fair return on property dedicated to public use. *Id.*
Ordinarily time alone can satisfactorily demonstrate whether rate fixed by ordinance is or is not confiscatory. *Id.*
Refusal to enjoin rate making ordinance not regarded as confiscatory on conclusion that it allowed a less return on valuation than that thought proper by Master, where ordinance attacked before opportunity for test. *Id.*

PURE FOOD AND DRUGS:
State legislature may prohibit sale of food preservatives containing boric acid without offending equal protection provision of Constitution. *Price* v. *Illinois* 446
Prohibition against sale of food preservatives containing boric acid not deprivation of property without due process of law. *Id.*
Police statute not unconstitutional under due process clause because innocuousness of prohibited article is debatable. *Id.*
Provisions of law of Illinois of 1907, prohibiting sale of food preservatives containing boric acid, not unconstitutional under Fourteenth Amendment, or as to sales within State of articles involved in action in packages in which sold, under commerce clause. *Id.*

QUALIFICATION OF VOTERS. See **Suffrage.**

QUO WARRANTO:
In early days usurpation of office a crime and prosecuted as such; later *quo warranto* used to determine title as between two claimants. *Newman* v. *Frizzell* 537
Under District of Columbia Code *quo warranto* extends to all persons in District exercising any office, civil or military. *Id.*
Under District of Columbia Code, third person may not

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institute *quo warranto* proceedings without consent of law officers of Government and Supreme Court of District. *Id.*
The Code makes a distinction between " third person " and " interested person." *Id.*
The general interest of a citizen and taxpayer is not sufficient to authorize the institution of *quo warranto* proceedings. *Id.*
Citizen and taxpayer as such may not maintain *quo warranto* proceedings against incumbent of office on consent of court but without that of law officers of Government. *Id.*
Interested person within meaning of provisions of Code is one who has an interest in the office peculiar to himself, whether the office be elective or appointive. *Id.*

See **Jurisdiction, II,** 2.

RAILROADS:

Business of railroad is transportation, and to supply public with conveniences not connected therewith is no part of its ordinary duty. *Great Northern Ry.* v. *Minnesota* 340
State commission may only require railroad to supply such demands of public as are within the duty of a railroad. *Id.*
Where facilities offered by a railroad are at certain of its stations outside its actual duty, state commission may not absolutely require it to supply such facilities at every station, but must give company opportunity to discontinue discrimination. *Id.*
Possessions of railroad are subject to its public duty, but beyond this and within charter limits company may control its own affairs. *Id.*
That actions of railroad in connection with land granted were known to government officials and that no action was taken in regard thereto, does not amount to estoppel preventing Government from enforcing covenants contained in grants. *Oregon & Cal. R. R.* v. *United States* 393
Requiring railroads to provide means for water passing under embankments is legitimate exercise of police power. *Chicago & Alton R. R.* v. *Tranbarger* 67
Time limit in state statute requiring railroads to provide outlets for water across rights of way should be construed as limited to railroads erected after passage of act, and that, as to those already constructed, reasonable time should be allowed. *Id.*
Amendment of statute requiring railroads to maintain ditches along right of way so as to require outlets for water and im-

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posing liability and penalties for non-compliance within three months after completion, held, in action for damages, not an *ex post facto* law where embankment causing damage had been erected more than three months prior to amendment. *Id.*

Order of state railroad commission requiring railroad to install and maintain scales amounts to a taking of company's property. *Great Northern Ry.* v. *Minnesota* 340

Facts established must be adequate as a matter of law to support finding of requisite public necessity in justifying order of state commission to require railroad to expend money—mere declaration of commission not conclusive. *Id.*

Provisos in Land Grant Act of 1866, as amended in 1868 and 1869, and in act of 1870, relative to sale of land granted, are not conditions subsequent, violation of which results in forfeiture of grants, but are enforceable covenants. *Oregon & Cal. R. R.* v. *United States* 393

Under such acts there was a complete grant to the railroad with power to sell limited only as prescribed; and those setting up alleged rights in the land by reason of settlement thereon cannot sustain their claim thereto. There can be no absolute right to purchase and settle on lands where there is no compulsion to sell. *Id.*

Enjoining railroad from violation of conditions contained in land grant. *Id.*

See **Common Carriers.**

RATE REGULATION:

Fixing of rates to be charged by public service corporations is legislative function of State. *Milwaukee Electric Ry.* v. *Wisconsin R. R. Comm.* 174

In absence of impairment of contract obligation, exercise by municipality of lawful power to fix rates does not deprive public utility of property without due process of law where it does not appear that rates are confiscatory. *Id.*

Mere distance not necessarily determining factor in fixing freight rates; competition largely entering therein. *Louisville & Nashville R. R.* v. *United States* 1

Good will, in its general sense, not considered in fixing valuation for purpose of rate making of public utility. *Des Moines Gas Co.* v. *Des Moines* 153

Going concern value an element in determining valuation on which owner of property dedicated to public use entitled

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to fair return; and in its determination each case controlled by its own circumstances. *Id.*

Presumption that going concern value of public utility considered in determining valuation for rate making purposes. *Id.*

Refusal to enjoin rate making ordinance not regarded as confiscatory on conclusion that it allowed a less return on valuation than that thought proper by Master, where ordinance attacked before opportunity for test. *Id.*

Ordinarily time alone can satisfactorily demonstrate whether rate fixed by ordinance is or is not confiscatory. *Id.*

While State may make contracts preventing it, for given periods, from rate making, such renunciation must be clear and unequivocal. *Milwaukee Electric Ry.* v. *Wisconsin R. R. Comm.*... 174

Where Interstate Commerce Commission has fixed amount of rate in light of findings made on consideration of much and varied evidence, and such rate not claimed confiscatory, held that findings support order fixing rates. *Louisville & Nashville R. R.* v. *United States*. 1

Finding of one of many rates to be higher than all others may raise presumption that single rate high; and if some of lower rates prescribed by Interstate Commerce Commission there is a *prima facie* standard for testing reasonableness of rate under investigation. *Id.*

Common measure of value, applicable to some extent to freight charges, is comparison with amounts charged for same article by different persons. *Id.*

In attacking existing freight rate burden is on complainant to show unreasonableness in fact. *Id.*

RECORD:

Omission of evidence from record commendable on appeal under act of Oct. 22, 1913. *Louisville & Nashville R. R.* v. *United States* 1

Requirements of Equity Rules 75–77. *Id.*

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In early days usurpation of office a crime and prosecuted as such; later *quo warranto* used to determine title as between two claimants. *Newman* v. *Frizzell* 537

As to election, see *Pennsylvania R. R.* v. *Clark Coal Co.*.... 456

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REMOVAL OF CAUSES: PAGE

Under Employers' Liability Act as amended and § 28, Jud. Code, case brought in state court of competent jurisdiction under former, cannot be removed to Federal court upon sole ground of diversity of citizenship. *Kansas City Southern Ry.* v. *Leslie* 599

REPARATION. See **Interstate Commerce.**

REPORTS OF COMMITTEES. See **Construction.**

RES JUDICATA:

Corporation grantee of portion of grantor's property not privy to grantee of another portion, and judgment against latter in suit in which corporation not a party, although some of its officers as individuals had notice thereof and took some part in defense, is not *res judicata* if acts of officers not authorized by corporation. *Kapiolani Estate* v. *Atcherley* 119

To make judgment against grantor available to grantee of title his covenantor must receive notice of suit and have opportunity to defend. *Id.*

Court may change its action after an interlocutory decree and party to action may avail himself of such change, unless decision has finality of *res judicata*. *Id.*

Partition suit, dismissed because plaintiff could not maintain it against defendants holding adversely without first establishing title in equity, not *res judicata* that plaintiff had no interest in the property and a bar to action of ejectment by plaintiff against same defendants. *Woodward* v. *De Graffenried* 284

RESTRAINT OF TRADE:

Contract which enables railroad company to practically control output, sales and price of coal and to dictate to whom to be sold, is illegal. *United States* v. *Delaware, L. & W. R. R.* 516

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As general rule, meanders not treated as boundaries, and when United States conveys tract of land by patent referring to an official survey showing same bordering on navi-

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gable river, purchaser takes title up to water line. *Producers Oil Co.* v. *Hanzen* 325
Where facts and circumstances affirmatively disclose intention to limit grant to actual traverse lines, these treated as definite boundaries; and patent to fractional section does not necessarily confer riparian rights because of presence of meanders. *Id.*
Where survey of improved lands was made at express request of occupant to whom subsequently patented, and grant specified the number of acres, and other circumstances also indicated that only the lands conveyed were those within the traverse lines, the patent conferred no riparian rights but simply conveyed the specified number of acres. *Id.*
Effect of riparian rights, attached to land conveyed by patent of United States, depends upon local law. *Id.*

RULE OF PROPERTY:
Decisions of state court regarding descent of property, the earliest made within three years and after action commenced, not regarded as rule of property binding on this court. *Woodward* v. *De Graffenried* 284

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Equity rules 75–77 call for presentation of only relevant evidence and exhibits; elimination of reduplication; and condensation into narrative form. *Louisville & Nashville R. R.* v. *United States* 1

SAFETY APPLIANCE ACT:
Coupler provisions directed against evils attendant upon old-fashioned link and pin couplers and were not enacted to provide place of safety between colliding cars. *St. Louis & S. F. R. R.* v. *Conarty* 243
Employé of railroad not endeavoring or intending to couple or uncouple a car or to handle it in any way, but riding on engine that collided with it, not in position where absence of coupler and draw bar operates as breach of duty imposed by Act for his benefit. *Id.*
See **Employers' Liability Act.**

SALES:
Effect of provisos in Land Grant Acts relative to sale of lands granted. See *Oregon & Cal. R. R.* v. *United States*. . . . 393
Prohibitions within police power. See *Price* v. *Illinois* 446

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Validity of prohibition against sale of food preservatives. *Id.*

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SLEEPING CAR COMPANIES:

Wisconsin statute imposing penalties on sleeping car companies if, lower berth being occupied, upper let down before actually engaged, is unconstitutional under due process of law clause of Fourteenth Amendment as arbitrary taking of property without compensation; and cannot be justified as health measure under police power, nor as amendment or alteration of charter of corporation. *Chicago, M. & St. P. R. R.* v. *Wisconsin*. 491

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It is not in derogation of its sovereignty that State be charged with interest if agreement to pay principal so provides. *Virginia* v. *West Virginia* 202

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Legislative power: Legislature may prohibit sale of food preservatives containing boric acid without offending equal protection provision of Constitution. *Price* v. *Illinois* 446

Establishment of literacy test for exercising suffrage is exercise of lawful power which is not subject to supervision by Federal courts. *Guinn* v. *United States* 347

Cannot authorize individual to take salable property from another without pay. *Chicago, M. & St. P. R. R.* v. *Wisconsin*. 491

Regulation of common carriers: Fixing of rates to be charged by public service corporations is legislative function of State. *Milwaukee Electric Ry.* v. *Wisconsin R. R. Comm.* 174

Right to regulate public carriers in interest of public does not warrant unreasonable interference with right of management or taking of property without compensation. *Chicago, M. & St. P. R. R.* v. *Wisconsin* 491

While State may make contracts preventing it, for given periods, from rate making, such renunciation must be clear and unequivocal. *Milwaukee Electric Ry.* v. *Wisconsin R. R. Comm.* 174

Power over interstate commerce: May not interfere with interstate transportation of intoxicating liquors except as permitted by Congress. *Rossi* v. *Pennsylvania* 62

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May not, in case arising prior to Webb-Kenyon Law, punish one who sells and delivers liquor in original packages within State pursuant to orders solicited within State but delivered from without. *Id.*

Effect of Webb-Kenyon Act to change general rule that State may not regulate commerce wholly interstate. *Adams Express Co.* v. *Kentucky* 190

Police power: Police power extends to imposing restrictions having reasonable relation to preservation of health; and nature and extent of such restrictions are matters for legislative judgment in defining policy of State. *Price* v. *Illinois*. 446

Taxation by: May tax life insurance companies upon business done within State and measure tax upon premiums on policies of residents thereof. *Equitable Life Society* v. *Pennsylvania*. 143

Application of Constitution: Fifteenth Amendment does not, in general sense, take from States power over suffrage possessed from the beginning, but does restrict power of United States or States to abridge or deny right of citizen to vote on account of race, color or previous condition of servitude. *Guinn* v. *United States*. 347

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While Fifteenth Amendment does not confer right of suffrage on any class, it does prohibit States from depriving any person of that right, whether for Federal, state or municipal elections. *Myers* v. *Anderson*. 368

Provisions in state constitution recurring to conditions existing before adoption of Fifteenth Amendment and continuance of which the Amendment prohibited, and making such conditions test of right to suffrage, are void. *Guinn* v. *United States*. 347

Contracts of: Contract to assume equitable proportion of interest-bearing debt means taking over of liability for both interest and principal. *Virginia* v. *West Virginia* 202

In a contract between sovereign States questions of whether debtor party liable for interest on ascertainment of amount due, rate of interest and period from which to be computed, determined by fair intendment of contract itself. *Id.*

It is not in derogation of its sovereignty that State be charged with interest if agreement to pay principal so provides. *Id.*

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Fifteenth Amendment does not, in general sense, take from States power over suffrage possessed from the beginning, but does restrict power of United States or States to abridge or deny right of citizen to vote on account of race, color or previous condition of servitude. *Guinn* v. *United States*.... 347
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While Fifteenth Amendment does not confer right of suffrage on any class, it does prohibit States from depriving any person of that right, whether for Federal, state or municipal elections. *Myers* v. *Anderson* 368
While Fifteenth Amendment gives no right of suffrage, as its command is self-executing, rights of suffrage may be enjoyed by reason of the striking out of discriminations against exercise of the right. *Guinn* v. *United States* 347
Myers v. *Anderson* 369
Provisions in state constitution recurring to conditions existing before adoption of Fifteenth Amendment and continuance of which the Amendment prohibited, and making such conditions test of right to suffrage, are void. *Guinn* v. *United States* 347
Establishment of literacy test for exercising suffrage is exercise by State of lawful power which is not subject to supervision by Federal courts. *Id.*
Suffrage and literacy tests in amendment of 1910 to constitution of Oklahoma so connected that unconstitutionality of former renders whole amendment invalid. *Id.*
Election officers refusing to allow persons to exercise suffrage because of unconstitutional state law, liable in civil action under § 1979, Rev. Stat. *Myers* v. *Anderson* 368
Where standards fixed for voters so interrelated that one cannot be held invalid without affecting others, entire provision fails. *Id.*
Where statute establishing qualifications for suffrage uncon-

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stitutional, it does not deprive citizens of right to vote, as previously existing statute unaffected. *Id.*
Section 19, Crim. Code, is constitutional and extends protection to right to vote for members of Congress and to have the vote when cast counted. *United States* v. *Mosley* .. 383
When originally enacted as § 6 of Enforcement Act it dealt with all Federal rights of all citizens and protected them all, and continues so to do. *Id.*
It applies to acts of two or more election officers who conspire to injure and oppress qualified voters of district in exercise of right to vote for members of Congress by omitting the votes cast from count and return. *Id.*
Grandfather Clause of Oklahoma constitution and of Maryland statute of 1908 violative of Fifteenth Amendment. *Guinn* v. *United States* 347
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SURFACE WATERS:
Statute providing for disposition of surface water, otherwise legal, not unconstitutional under Fourteenth Amendment because it applies exclusively to railroad embankments. *Chicago & Alton R. R.* v. *Tranbarger*. 67
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TAXES AND TAXATION:
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State may tax life insurance companies upon business done within State and measure tax upon premiums on policies of residents thereof. *Id.*
In estimating amount of premiums paid by residents of State as basis for taxation of insurance companies by State, those paid to foreign companies outside of State may be included without depriving such companies of their property without due process of law. *Id.*
Pennsylvania act of 1895, levying tax on gross premiums of life insurance companies received for business done within State, does not amount to taking property beyond its jurisdiction as to premiums paid directly to a corporation outside of State. *Id.*

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Regulations requiring payment of rates of public service corporations in advance are not unreasonable, and a telephone company is not subject to penalties for refusing to render service to a subscriber who is delinquent on past rates and refuses to pay in advance in accordance with established rule uniformly enforced, nor because it charges full price to subscriber who does not pay in advance while allowing stated discount to those who do. To enforce against such company penalty for refusing to furnish service under such conditions amounts to deprivation of property without due process. *Southwestern Tel. Co.* v. *Danaher*. 482

TITLE:

Under law of Hawaii, guardian cannot, through award of Land Commission, obtain title to property of ward which would be so immune from subsequent attack that the wrong would be without redress. *Kapiolani Estate* v. *Atcherley* . . 119

Effect of § 32, act of 1910, relative to deeds to tribal lands issued after death of party entitled, was to make patented lands part of estate of nominal party as though deed had issued during his life; and where title previously given by decree of probate court having jurisdiction it simply established validity of title. *Perryman* v. *Woodward* 148

In action of ejectment brought by United States, where result depended upon validity of probate and registration of the deeds under which the Government claimed, held, that such deeds were valid and properly probated and registered, and passed title. *United States* v. *Hiawassee Lumber Co*. 553

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TORTS. See **Actions; Employers' Liability Act.**

TRIAL. See **New Trial.**

TRIBAL LANDS. See **Public Lands.**

TRUSTS AND TRUSTEES:

A trust of certificates of stock to cause dividends thereon to be paid to designated party as beneficiary for a specified period and on expiration thereof to transfer stock itself to beneficiary if living unless childless in which event trustee was to hold stock and pay dividends to beneficiary during life and on his death to distribute to designated parties,

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held, to have failed in case of death of beneficiary within period specified both as to the stock and dividends and that the trustee was bound to return the stock to donor and that it did not pass to the heirs or personal representative of beneficiary. *Chater* v. *Carter* 572

In construing a declaration of trust in form of a letter and phrased in simple language, guiding principle is to seek intention of maker, as expressed in instrument; and the court is not called upon to strain the meaning of words. *Id.*

Where death of beneficiary defeats trust and leaves trustee without directions or authority to transfer fund to any beneficiary, as trustee cannot in equity retain fund for himself, he is *functus officio* and there is a resulting trust for the donor to whom he must redeliver the fund. *Id.*

See **Public Lands.**

UNITED STATES:

In controversy between individuals as to extent of land conveyed by patent and to which United States not a party, nothing in opinion or judgment should be taken to prejudice any of the rights of the United States in the lands affected. *Producers Oil Co.* v. *Hanzen*. 325

That actions of railroad in connection with land granted were known to government officials and that no action was taken in regard thereto, does not amount to estoppel preventing Government from enforcing covenants contained in grants. *Oregon & Cal. R. R.* v. *United States* 393

In action of ejectment brought by United States where result depended upon validity of probate and registration of the deeds under which the Government claimed, *held*, that such deeds were valid and properly probated and registered, and passed title. *United States* v. *Hiawassee Lumber Co.* 553

USURPATION OF OFFICE. See **Office.**

VALUATION:

Common measure of value, applicable to some extent to freight charges, is comparison with amounts charged for same article by different persons. *Louisville & Nashville R. R.* v. *United States*. 1

See **Accounts and Accounting; Evidence; Property Rights.**

VENDOR AND VENDEE. See **Interstate Commerce.**

VERDICT: PAGE

Jurors should not reach verdict by lot or by averaging amounts suggested by each; but verdict may not be set aside on testimony of juror. *McDonald* v. *Pless* 264

Where verdict in action under Employers' Liability Act increased by inclusion as beneficiaries of parties not entitled, defendant may raise question in manner appropriate under practice of trial court. *Central Vermont Ry.* v. *White* 507

VESTED RIGHTS:

No person has vested right in any general rule of law or policy of legislation giving him immunity from change, and such immunity is not to be implied as unexpressed term of express contract. *Chicago & Alton R. R.* v. *Tranbarger* 67

VIRGINIA v. WEST VIRGINIA:

This controversy being one between States, referred to this court in reliance upon the honor and constitutional obligations of the parties, it has been determined only after the amplest opportunity for hearing and with full recognition of every existing equity.

West Virginia is entitled to have the assets in the Virginia sinking fund and those specifically appropriated for payment of the debt applied in reduction of her share of the debt in the same proportion (23½%) as she is liable therefor. The proper date for the division of the assets in the sinking fund and the taking account of the indebtedness to be divided between Virginia and West Virginia is January 1, 1861, as fixed by the contract.

After considering all the exceptions to the Master's second report in this case, *held* that there should be deducted from West Virginia's share (23½%) of the principal debt of Virginia on January 1, 1861, already fixed, 220 U. S. 1, 35, at $7,182,507.46, the same proportionate part of the value of the assets in the sinking fund on that date and retained by Virginia amounting to $2,966,885.18, so that West Virginia's net share of the debt, is now fixed at $4,215,622.28 exclusive of interest.

In determining what rate of interest West Virginia should pay on the proportion of the debt of Virginia assumed, the action of Virginia in regard to interest on the debt should be considered and under all the circumstances of the case *held*, in fixing the equitable proportion of West Virginia, that her part of the principal should be placed on a three

VIRGINIA v. WEST VIRGINIA—*Continued.* PAGE
per cent. basis as of July 1, 1891, with three per cent. per annum interest from that date, and with four per cent. per annum interest from July 1, 1861, to July 1, 1891, making a total of interest to July 1, 1915, of $8,178,307.22 and the total of the debt $12,393,929.50.
The decree shall provide for interest on five per cent. per annum on the total amount awarded by the decree from the date of entry. *Virginia* v. *West Virginia* 202
See **Accounts and Accounting; States.**

VIS MAJOR. See **Common Carriers.**

WATERS. See **Railroads; Riparian Rights; Surface Waters.**

WEBB-KENYON ACT.
Effect of Webb-Kenyon Act to change general rule that State may not regulate commerce wholly interstate. *Adams Express Co.* v. *Kentucky*. 190
See **Intoxicating Liquors.**

WILSON ACT. See **Intoxicating Liquors.**

WISCONSIN:
Statute imposing penalties on sleeping car companies if, lower berth being occupied, upper let down before actually engaged, is unconstitutional under due process of law clause of Fourteenth Amendment as arbitrary taking of property without compensation; and cannot be justified as health measure under police power, nor as amendment or alteration of charter of corporation. *Chicago, M. & St. P. R. R.* v. *Wisconsin* 491

WORDS AND PHRASES:
"Actual settlers" in Land Grant statute indicate no particular individuals. *Oregon & Cal. R. R.* v. *United States* ... 393
"Interested person" within meaning of *quo warranto* provisions of District of Columbia Code. See *Newman* v. *Frizzell* 537
Court will not pass upon definition of disputed terms in state statute where that point of no consequence to plaintiff in error. *Mallinckrodt Works* v. *St. Louis* 41

WRIT AND PROCESS. See **Habeas Corpus; Injunction: Jurisdiction; Quo Warranto.**

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